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SHDKT PROCEEDINGS AND ORDERS DATE: [11/28/95]

CASE NBR: [95105996] CSH STATUS: [DECIDED]
SHORT TITLE: [Carpenter, David J.]
VERSUS [Gomez, Dir., CA DOC, et al.] DATE DOCKETED: [091495]
*** CAPITAL CASE -- No date of execution set *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Aug 4 1995	G	Application (A95-114) to extend the time to file a petition for a writ of certiorari from August 15, 1995 to September 14, 1995, submitted to Justice O'Connor.
2	Aug 7 1995		Application (A95-114) granted by Justice O'Connor extending the time to file until September 14, 1995.
3	Sep 14 1995	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Oct 6 1995		Brief of respondents James H. Gomez, Director, et al. in opposition filed.
6	Oct 19 1995		DISTRIBUTED. November 3, 1995 (Page 6)
7	Oct 19 1995	X	Reply brief of petitioner David Joseph Carpenter filed.
9	Nov 6 1995		REDISTRIBUTED. November 9, 1995 (Page 13)
11	Nov 13 1995		Petition DENIED. Opinion by Justice Stevens respecting the denial of certiorari. (Detached opinion.)

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ORIGINAL

No. 95-5996

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DAVID J. CARPENTER, *Petitioner*,

v.

JAMES H. GOMEZ, Director, California Department of Corrections, and ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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CAPITAL CASE

QUESTIONS PRESENTED

(1) Is a jury's sense of responsibility diminished in violation of the federal Constitution as interpreted in Caldwell v. Mississippi and Romano v. Oklahoma when at least one juror during a capital trial, without the knowledge of the court or the parties, obtains inadmissible extrajudicial information regarding the defendant's prior murder convictions and sentence of death in another county?

(2) May a state court avoid the rule of per se reversal for trial by a biased juror, or the Chapman v. California prejudice standard for other federal constitutional errors, by concluding that the weight of the prosecution's evidence at either guilt or penalty phase of a capital case might require that a juror who was biased as a matter of fact be deemed not to have been biased as a matter of law?

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The petitioner David J. Carpenter respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of California reversing an order of the superior court which had granted his petition for writ of habeas corpus.

OPINION BELOW

The opinion of the Supreme Court of California is reported at 9 Cal.4th 634, 38 Cal.Rptr.2d 665, 889 P.2d 985, and is attached hereto as Appendix A. The court's order modifying

its opinion is reported at 10 Cal.4th 256a and is attached hereto as Appendix B. The court's order denying rehearing is attached hereto as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The Supreme Court of California filed its opinion on March 6, 1995. Mr. Carpenter's timely petition for rehearing was denied, and the opinion was modified, on May 17, 1995. On August 7, 1995, Justice O'Connor extended the time for filing this petition to September 14, 1995.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 5:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ; to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

United States Constitution, Amendment 8:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Amendment 14, § 1:

> ". . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner David J. Carpenter was convicted of capital murder and sentenced to death at two separate trials.

At a trial held in Los Angeles in 1984, he was convicted and sentenced for the murder of Ellen Hansen and the attempted murder of her companion Steven Haertle on March 29, 1981, and the murder of Heather Scaggs on May 2, 1981. These offenses occurred in Santa Cruz County, California, and the trial was moved to Los Angeles on a change of venue. Haertle identified Mr. Carpenter as the person who shot him. Evidence was presented that Mr. Carpenter had access to a distinctive jacket similar to the one certain eyewitnesses said the assailant had been wearing. There was no direct evidence that Mr. Carpenter was the person who killed Scaggs, but there was evidence he and Scaggs had arranged to meet one another on the morning of May 2, and that she was never seen alive after the time they had planned to meet. The prosecution also presented a ballistics comparison indicating that the same gun had been used in the Scaggs and Hansen-Haertle shootings. See 9 Cal.4th at 640; Supp. CT 60-61, 119-20.

At a trial in San Diego in 1988, the trial here at issue, Mr. Carpenter was convicted and sentenced for the murders of Cynthia Moreland and Ronald Stowers on October 11, 1980, Anne Alderson on October 13, 1980, and Diane O'Connell and Shauna May on November 28, 1980, all in Marin County, California. The trial was moved to San Diego on a change of venue. There were no eyewitnesses to any of these crimes. At the guilt phase of the trial, the prosecution based its case that Mr. Carpenter was the perpetrator primarily on the testimony of Steven Haertle and the other witnesses to the shooting of Hansen and Haertle, and on expert ballistics evidence that the same gun had been used to shoot Hansen and Haertle as had been used in the five Marin homicides for which Mr. Carpenter was on trial. Mr. Carpenter, through his own testimony and that of other witnesses,

presented an alibi defense. The defense agreed with the prosecution that the same person had committed all the offenses, but argued that Mr. Carpenter was not that person. At the penalty phase, the prosecution presented evidence of the killing of Heather Scaggs. The defense presented 28 witnesses in mitigation over a period of two weeks. See 9 Cal.4th at 640-42; CT 92-95, 126-30; Supp. CT 95-96, 220-22. Prior to trial, the judge ruled that evidence of the Scaggs killing would not be admissible at the guilt phase, and ruled that evidence that Mr. Carpenter had been convicted and sentenced to death for the Hansen-Haertle and Scaggs offenses would not be admissible at either phase of trial. CT 20-22.

During the guilt phase of the trial, Juror Barbara Durham, who became foreperson of the jury, committed the misconduct which was described as follows by the state supreme court:

> .... Juror Durham had committed misconduct by receiving information outside of court relating to the convictions and death sentence for the Santa Cruz crimes. By March 26, 1988, in the middle of the guilt phase, she had received the forbidden information from newspaper accounts, either directly or through her husband. Until at least March 26, 1988, the couple received delivery of a newspaper at their home. They had falsely stated in their original declarations that they had canceled their subscription around the opening of the guilt phase. Instead, they ordered cancellation on, or as of, March 26, 1988. At all relevant times, they were experiencing drinking problems and marital troubles. [Her husband] Ronald openly criticized the trial as a waste of time and money, having learned that Carpenter had already been convicted and sentenced to death for the Santa Cruz crimes. The "situation" was "very explosive," presenting an "opportunity for a verbal battle between husband and wife while parties have been drinking." "[O]n many occasions he apparently told her when she would come home from this trial, . . . 'I know so much more about this case than you do.' [¶] . . . I don't know what would provoke that kind of response unless Mrs. Durham is somehow talking about aspects of the case." He had the "opportunity . . . to let his wife know in no uncertain terms that you're just wasting your time on this trial because Mr. Carpenter has already got the death sentence and he's bec convicted of similar crimes."
>
> The superior court also found that Juror Durham had committed misconduct by discussing the case pending before her and Carpenter's Santa Cruz convictions and death sentence with nonjurors, including [Michael] Lustig and [Donna] Duran. On March 26, 1988, Lustig, Duran and others were having dinner at a resort in San Diego County. Lustig invited the Durhams, who were social acquaintances but not close friends, to his table. At Lustig's table, Juror Durham initiated a five- or ten-minute conversation about the Marin case. She stated something like the jury was not supposed to know this, but Carpenter had already been convicted and sentenced to death for the Santa Cruz crimes. The court found Juror Durham to be "very outspoken," and to have "no hesitancy talking about her marital problems" even "with a virtual stranger . . . . And . . . that's somewhat similar to the fact that she would share with a stranger her confidential information about this case." "[S]he wanted to be the center of attention that night, and that kind of disclosure placed her in the center of attention with the Lustig[]" party. She admitted she had discussed the Marin case with Lustig and Duran, but denied revealing that she knew the forbidden information and knew it was forbidden. The court did not credit this.

9 Cal.4th at 642-43 (internal quotations are from the trial court's findings).

The jury returned its verdict of death on June 27, 1988, and Mr. Carpenter was sentenced to death on July 19, 1988. On September 26, 1988, Mr. Carpenter filed a petition for writ of habeas corpus in the superior court of San Diego County, asserting that Juror Durham's misconduct required that the conviction and sentence of death be set aside. CT 4-11. An evidentiary hearing was held on the misconduct allegations before Judge Herbert Hoffman, the same judge who had presided at the trial. Durham denied under oath that she had known during the trial of Mr. Carpenter's prior convictions and death sentence, or that she had told Lustig and Duran that she had improperly learned of the information. She further testified that she and her husband never discussed the case during the trial and that he never told her any information about the case. RT 1059. Judge Hoffman made detailed factual findings that Durham had committed misconduct, that Durham had testified untruthfully at the post-trial evidentiary hearing, that her extrajudicial knowledge had diminished her sense of responsibility as a penalty juror, and that her misconduct had compromised her impartiality with respect to both the guilt and penalty phases of the trial. RT 1602-36, 1689-1700; see also RT 1657. He granted Mr. Carpenter's petition for writ of habeas corpus.[1] CT 301.

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1. He also referred Durham to the prosecuting authorities for possible criminal prosecution under section 96 of the California Penal Code, which provides that a juror commits a felony when he (continued...)

On appeal by the prosecution, the California Supreme Court by a vote of 4-3 reversed the judgment and ordered that the petition for writ of habeas corpus be denied.[2] [Appendix A hereto.]

HOW THE FEDERAL QUESTIONS WERE PRESENTED BELOW

Question 1, concerning the diminution of the juror's sense of responsibility, was presented to the trial court in "Petitioner's Brief ... re Whether a New Trial Must be Granted for Jury Misconduct." Supp. CT 82. It was expressly ruled upon in the trial court's oral decision. RT 1690-93. Mr. Carpenter relied on this portion of the trial court's ruling as a basis for affirming the trial court's order on page 45 of his brief filed November 22, 1993 in the California Supreme Court. It was rejected on page 655 of 9 Cal.4th.

Question 2, concerning the standard of prejudice, was presented to the trial court in "Petitioner's Brief ... re Whether a New Trial Must be Granted for Jury Misconduct," passim, Supp. CT 69-114, and particularly at Supp. CT 71-72. It was ruled upon by the superior court in its oral opinion. RT 1689-99. It was presented to the California Supreme Court in pages 52-60 of Mr. Carpenter's brief. The latter court's ruling appears on pages 655-658 of 9 Cal.4th.

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1. (...continued)
or she "[w]illfully and corruptly permits any communication to be made to him, or receives any book, paper, instrument, or information relating to any cause or matter pending before him, except according to the regular course of proceedings." RT 1700.

2. One of the dissenters was Chief Justice Malcolm M. Lucas. Chief Justice Lucas has served on the California Supreme Court since 1984. During that time, he has participated in the decision of more than 200 death penalty cases by published opinion. The extraordinary nature of the present case is demonstrated by the fact that it is the only one of those more than 200 cases in which he has dissented from a decision denying relief to a person under sentence of death.

REASONS FOR GRANTING THE WRIT

1. A JUROR'S SENSE OF RESPONSIBILITY FOR THE SENTENCING DECISION IN A CAPITAL CASE IS UNCONSTITUTIONALLY DIMINISHED UNDER THE EIGHTH AMENDMENT WHEN THE JUROR, WITHOUT THE KNOWLEDGE OF THE COURT OR THE PARTIES, OBTAINS INADMISSIBLE EXTRAJUDICIAL INFORMATION REGARDING THE DEFENDANT'S PRIOR MURDER CONVICTIONS AND SENTENCE OF DEATH IN ANOTHER COUNTY.

A juror committed misconduct during the guilt phase of Mr. Carpenter's capital trial by learning outside of court that the defendant previously had been convicted of murder in another county and sentenced to death. The juror compounded her misconduct by failing to inform the court of what she had learned and by lying to the court when confronted with her misconduct. Certiorari should be granted to determine whether a juror's sense of responsibility is diminished in these circumstances so as to render the death verdict unreliable within the meaning of the Eighth Amendment under Caldwell v. Mississippi, 472 U.S. 320 (1985) and Romano v. Oklahoma, 512 U.S. ___, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994).

The juror misconduct which occurred in this case undermines one of the foundations upon which this Court's modern capital jurisprudence is based: that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." McGautha v. California, 402 U.S. 183, 208 (1971), quoted in Caldwell v. Mississippi, supra, 472 U.S. at 329-30; Lockett v. Ohio, 438 U.S. 586, 598 (1978) (plurality opinion). The belief that sentencers actually treat their power to determine the appropriateness of death as an awesome responsibility has allowed this Court to view sentencer discretion as consistent with, and indispensable to, the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." Caldwell v. Mississippi, supra, at 240, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion).

Both Caldwell, supra, and Romano, supra, acknowledge that certain information has the power to diminish a juror's sense of responsibility. This case is similar to Caldwell and Romano in that it presents the question of how certain information affects a juror's sense of responsibility, but differs in that the information was obtained through juror misconduct outside the processes of the court.

Caldwell and Romano focus on the accuracy of the information imparted to the jury to assess whether the sentencing verdict was constitutionally reliable. In Caldwell, the prosecutor made misleading and inaccurate arguments to the jury that the ultimate responsibility for the sentencing decision rested with the appellate courts rather than the jury. This Court held that it was constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for the appropriateness of the defendant's death rests elsewhere. Caldwell, at 328-29. Justice O'Connor, concurring in part and in the judgment, emphasized that the prosecutor's argument was impermissible because it was inaccurate and misleading in a manner that diminished the jury's sense of responsibility. Id. at 342 (O'Connor, J., concurring).

In Romano, the state trial court admitted into evidence defendant's previous conviction for another capital crime and sentence of death. This Court found no Caldwell error in Romano because the admission of evidence regarding Romano's prior death sentence did not affirmatively mislead the jury regarding its role in the sentencing process so as to diminish unconstitutionally its sense of responsibility. Justice O'Connor, again concurring, stressed that the Caldwell claim failed because the evidence of the prior death sentence was accurate at the time it was admitted. Romano, 512 U.S. at ___, 114 S.Ct. at 2013, 129 L.Ed.2d at 14-15 (O'Connor, J., concurring).

In both Caldwell and Romano the information was received in court, with the full knowledge of the parties. The danger that the jury will render an unreliable verdict based on information which has diminished its sense of responsibility may be lessened or eliminated if the parties and court are aware the information is before the jury, and have the opportunity to address the information through other accurate evidence, argument and instructions. But that danger is increased when the information is obtained surreptitiously by a juror and kept secret throughout the guilt and penalty phases of the trial. Mr. Carpenter's death verdict was constitutionally unreliable not only because the impact of the information about his prior death sentence and convictions diminished the juror's sense of responsibility, but also because Mr. Carpenter was unable to address the impact of the information through evidence, argument and instructions.

This Court has previously held a capital sentence unconstitutional where confidential information in a pre-sentence report was considered by the judge determining the penalty. Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion). Justice White concurred in the judgment only, basing his decision solely on the Eighth Amendment: "A procedure for selecting people for the death penalty which permits consideration of such secret information relevant to the 'character and record of the individual offender,' fails to meet the 'need for reliability in the determination that death is the appropriate punishment.'" Id. at 363-64 (White, J., concurring in the judgment; internal citation omitted). The unreliability injected into Mr. Carpenter's penalty trial was even greater than in Gardner's sentencing. First, the trial court here made pretrial rulings excluding evidence of petitioner's prior death sentence and prior murder convictions. Mr. Carpenter not only was unaware that Juror Durham had secret information, he presented his case assuming that that very information was not available to the jury. Second, the information that Durham obtained was the kind which can undermine a juror's sense of responsibility for the verdict because, at a minimum, it could lead a juror

to conclude that his or her sentencing decision was merely a formality in light of the previous sentence.[3] Under such circumstances, the juror's misconduct injected an unconstitutional element of unreliability into the penalty proceedings as surely as the prosecutor's argument did in Caldwell.

The trial court's factual finding that the juror's sense of responsibility was diminished in this case -- the finding which underlay its ruling that Caldwell error occurred -- is undisputed. It was neither put in issue by the state on appeal, nor overturned by the state supreme court. The trial court found as follows:

> . . . Mrs. Durham had knowledge from her husband that Mr. Carpenter, because of a conviction [for] similar crimes, had been given the death sentence by another jury. In this Court's judgment, without any question, this information would serve to minimize her sense of responsibility in making the difficult and uncomfortable penalty determination.
>
> She could very likely have concluded that since a person can be executed only once, the second death penalty sentence, the one that she was contemplating, was a mere formality, and the real possibility for the defendant's -- responsibility for the defendant's death sentence belonged to the first jury and not herself.

RT 1693.

The facts of this case increased the likelihood that the diminished sense of responsibility described by the trial court was of constitutional dimensions. The prior murders and death sentence that the juror heard about were the Santa Cruz County killings which were linked by ballistics evidence to the crimes for which Mr. Carpenter was then on trial. As pointed out in the dissent below, the two ultimate questions that the juror had to address were: Was Mr. Carpenter the person responsible for all these homicides? And, if so, what penalty should he suffer? 9 Cal.4th at 684 (Mosk, J., dissenting). Juror Durham's knowledge that another jury had answered the first

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3. Under Caldwell's reasoning, diminution of jurors' sense of responsibility violates the Eighth Amendment's reliability requirement, whether or not a defendant can demonstrate empirically that the effect of this diminution was to bias the jurors' judgment toward death. Caldwell, 472 U.S. at 341; Romano, 512 U.S. at ___, 114 S.Ct. at 2016, 129 L.Ed.2d at 18 (Ginsburg, J., dissenting).

question in the affirmative, and the second question with a verdict of death, necessarily undermined her sense of responsibility for making the same decisions herself, and in a manner categorically different from Romano.

The state supreme court's rejection and perfunctory analysis of the trial court's determination that Caldwell error occurred demonstrates its misunderstanding of the issue. The court held that, "For reasons stated in Romano. . . [the finding of Caldwell error] is incorrect, at least without considering the instructions that the jury was given and other relevant information from the trial." 9 Cal.4th at 655. Romano involved the effect of evidence on the jury, where the defendant had the opportunity to address the evidence through other evidence, argument and instruction. This Court rejected Romano's Caldwell claim in part because the court's instructions properly limited the jury's consideration of the evidence. This Court has been reluctant to infringe on the traditional latitude of the States to establish evidentiary rules at sentencing proceedings. Romano, 512 U.S. at ___, 114 S.Ct. at 2009, 129 L.Ed.2d at 10, citing Gregg v. Georgia, 428 U.S. 153, 203-04 (1976). The jury instructions in the present case are of little consequence in assessing petitioner's Caldwell claim, since the information was obtained through misconduct and was outside the scope of the instructions given. The state supreme court's insistence on treating information obtained through jury misconduct as mere evidentiary error undermines the authority of its decision overruling the trial court's new trial order based on Caldwell error.

The information the juror learned through her misconduct was precisely the kind which would lead her to believe that her penalty verdict was not "the awesome decision of life and death" envisioned by Justice Harlan in McGautha. Indeed, it is likely she shared her husband's belief that she was " just wasting [her] time in this trial." See RT 1627. The "meticulous presentation of evidence and careful instruction on the law are of minimal value to a defendant whose jury has been

led to believe that its verdict is of little or no consequence." Sawyer v. Smith, 497 U.S. 227, 248 (1990) (Marshall, J., dissenting). The writ should be granted.

2. THE STRENGTH OF THE EVIDENCE OF GUILT OR IN AGGRAVATION IS IRRELEVANT IN ASSESSING WHETHER A JUROR HAS BECOME BIASED THROUGH HER MISCONDUCT.

Certiorari should also be granted because the California Supreme Court's analysis of the prejudice resulting from federal constitutional errors in this and other capital cases is grossly inconsistent with this Court's decisions. By permitting trial by a biased juror when, in hindsight, the evidence of guilt or in aggravation appears strong, the state court has erroneously circumvented the "structural error" analysis prescribed in Arizona v. Fulminante, 499 U.S. 279 (1991), and Vasquez v. Hillery, 474 U.S. 254, 262-63 (1986). The state court's prejudice analysis is also inconsistent with the standard of prejudice specified in Chapman v. California, 386 U.S. 18, 24 (1967).

A

During the guilt phase of trial, the foreperson of the jury which sentenced Mr. Carpenter to death, Barbara Durham, improperly learned outside the courtroom that another jury had previously convicted Mr. Carpenter and sentenced him to death for the Santa Cruz County murders which were linked by ballistics evidence to the Marin County offenses for which her jury was trying him. The judge had excluded evidence of the Santa Cruz convictions and sentences, as well as evidence of one of the two underlying Santa Cruz homicides. He had instructed the jury that the evidence of the other Santa Cruz homicide could be used only for the limited purpose of demonstrating identity or intent. He had also repeatedly admonished the jury to avoid exposure to publicity about the case, and to refrain from discussing the case with non-jurors. Nevertheless, Durham discussed the case, including her extrajudicial knowledge, with non-jurors during trial. She

knew that she was engaging in misconduct, and failed to report her misconduct to the judge. When her misconduct came to light shortly after the trial, she compounded it by testifying falsely under oath at a post-trial evidentiary hearing. Following that hearing, the trial court found that Durham's ability to judge both the guilt and the penalty phase impartially had been compromised by her misconduct. RT 1693, 1696.

The pretrial rulings excluding from the guilt phase evidence of the crimes against Scaggs and the Santa Cruz convictions and death sentence, rulings made before jury selection began, determined the structure of the trial. The parties crafted their cases in light of these rulings, and assumed that the jury would not hear what the court excluded. Had defense counsel known that the jury would be aware of Mr. Carpenter's Santa Cruz convictions, it is inconceivable that they would have presented a defense based on the proposition that the same person committed both the Santa Cruz and Marin offenses, but that that person was not Mr. Carpenter. Juror Durham's misconduct completely undermined the assumptions on which the parties proceeded to trial; the prejudice which flowed from her misdeeds cannot be assessed by considering the relative strength of evidence presented under such false assumptions. The prosecution's burden of proof was lightened and the asserted defense was contradicted by Durham's misconduct.

The manner in which this trial was structured around these pretrial evidentiary rulings demonstrates that Juror Durham's misconduct created a paradigm "structural defect" in the trial, which can never be harmless. Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991). Harmless-error analysis of any kind presupposes impartial factfinders; partiality on the part of a factfinder can never be harmless, regardless of the strength of the evidence at trial. Gray v. Mississippi, 481 U.S. 648, 668 (1987); Rose v. Clark, 478 U.S. 570, 577-78 (1986). Without an impartial factfinder, "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no

criminal punishment may be regarded as fundamentally fair.'" Rose v. Clark, supra, 478 U.S. at 577-78, quoted in Arizona v. Fulminante, supra, 499 U.S. at 310.

As the Court put it many years ago, even if a defendant is "clearly" guilty, "No matter what the evidence was against him, he had the right to have an impartial judge." Tumey v. Ohio, 273 U.S. 510, 535 (1927). More recently, the Court expressed the same view: "When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm[,]" so the error can never be harmless. Vasquez v. Hillery, supra, 474 U.S. at 263. The state trial judge found as a fact that the constitutional error in this case established the lack of objectivity of the foreperson of the jury charged with rendering judgment on Mr. Carpenter. RT 1693, 1696. The constitutional principle that trial before a biased juror can never be harmless error would be meaningless if it could be evaded as the court below did, by concluding that because of the strength of the evidence the juror might not have been biased at all, so there was no error. 9 Cal.4th at 655.[4]

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4. The decisions of this Court cited in the opinion below, see 9 Cal.4th at 647-50, do not support the state supreme court's decision. Those cases concern questions no longer at issue in this case: whether Juror Durham engaged in misconduct, and whether that misconduct impaired her ability to be impartial. The dissenting justices in the state court accurately described those cases and their lack of application to this case thus:

> *Smith* v. *Phillips* (1982) 455 U.S. 209, teaches that juror bias should not be implied by law in a federal habeas court, *not* that it may not be found in fact by a state trial court -- as is the case here. *Rushen* v. *Spain* (1983) 464 U.S. 114, is to the same effect. Similarly, *McDonough Power Equipment, Inc.* v. *Greenwood* (1984) 464 U.S. 548, teaches that, in a federal civil action, juror bias should not be implied by law but may be found in fact. *Romano* v. *Oklahoma* (1994) ___ U.S. ___ [114 S.Ct. 2004], does not even involve juror bias at all. Contrary to the majority's implication, it manifestly does not erect an obstacle against finding bias in a juror under circumstances such as those disclosed here.

9 Cal.4th at 680-81 n.7 (Mosk, J., dissenting). See also People v. Von Villas, 36 Cal.App.4th 1425, ___, 43 Cal.Rptr.2d 233, 250 (1995) (Woods, J., dissenting), pet. for review pending (concluding (continued...)

The state court's decision here is particularly inconsistent with Vasquez v. Hillery, supra, 474 U.S. at 263-64 (discrimination in the selection of a grand or petit jury is a structural defect which can never be harmless, no matter how overwhelming the evidence of guilt), and Gray v. Mississippi, supra, 481 U.S. 648 (erroneous decision to grant the prosecution's challenge for cause to a juror cannot be harmless error). In Hillery and Gray there was no suggestion of any personal bias on the part of any juror who actually served, whereas the state court in this case held that the strength of the evidence is relevant to whether or not the participation of a personally tainted juror in the deliberation process is prejudicial. Juror Durham's personal state of mind in the present case affected the structure of the factfinding process even more directly than did the errors in Gray and Hillery.

Certiorari should be granted in order to address this important constitutional question and to hold that the strength of the evidence presented to the jury can neither negate the federal constitutional error which is inherent in trial by a biased factfinder, nor cause such a structural error to be harmless.

B

The state supreme court failed to apply an appropriate standard of prejudice to any of the numerous constitutional errors implicated by Juror Durham's misconduct. The state-law

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4. (...continued)
that these four cases do not support the conclusion of the state supreme court in the present case because, unlike the serious and prejudicial juror misconduct in the present case, these cases concern "miscellaneous, common, and almost unavoidable trial imperfections"). The state court's inappropriate treatment of one of these cases, Smith v. Phillips, 455 U.S. 209 (1982), deserves particular mention. The state trial judge in Smith found a mere "indiscretion," and found neither misconduct nor prejudice, id. at 213-14, whereas the trial judge in the present case found both misconduct and prejudice on the part of Juror Durham. Nevertheless, the state court here twice implied that the facts of Smith were somehow more egregious than the facts of the present case. 9 Cal.4th at 647, 657-58.

standard, although purported to be less tolerant of error than a normal harmless-error test, in fact is substantially more tolerant of error.

The foreperson's misconduct implicated numerous federal constitutional rights of Mr. Carpenter in addition to his right to an impartial jury: He was deprived of his Sixth Amendment right to counsel, because his counsel prepared and presented the defense based on the belief that the jury was unaware of his Santa Cruz convictions and death sentence. He was deprived of his Sixth Amendment right to be confronted with the evidence against him, because he was given no opportunity to confront the extrajudicial sources from which the foreperson learned of the prior convictions and death sentence. Parker v. Gladden, 385 U.S. 363 (1966). He was deprived of his Eighth Amendment right to reliable adjudication at all stages of a capital case. Johnson v. Mississippi, 486 U.S. 578 (1988); Beck v. Alabama, 447 U.S. 625, 638 (1980) (same right at guilt phase). The prosecution's burden of proof was lightened, cf. Francis v. Franklin, 471 U.S. 307, 313-15 (1985), and Mr. Carpenter's right to present a defense was impaired, see Crane v. Kentucky, 476 U.S. 683, 690-91 (1986), both in violation of his right to due process under the Fifth and Fourteenth Amendments.

Violation of any of these rights required the state supreme court to affirm the trial court's order granting relief unless the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). The state supreme court applied only a state-law "substantial likelihood" standard in finding no prejudice. Although that court described this test as "'less tolerant than' normal harmless-error analysis," in fact it is more tolerant of error than the Chapman standard.[5]

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5. The state supreme court set forth the test it was applying in the following language, citing a number of its own state-law decisions rendered after the trial judge ruled in the present case:

> To summarize, when misconduct involves the receipt of information from
> (continued...)

It purports to require the verdict to be set aside "no matter how convinced we might be that an unbiased jury would have reached the same verdict," as the federal Constitution requires, e.g., Sullivan v. Louisiana, 508 U.S. ___, ___, 113 S.Ct. 2078, 2081-82, 124 L.Ed.2d 182, 189-90 (1993),

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5. (...continued)
> extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. (E.g., *People* v. *Holloway*, 50 Cal.3d [1098,] 1110-1112 [1990]; *People* v. *Marshall*, 50 Cal.3d [907,] 951-952 [1990].) Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. (E.g., *In re Hitchings*, 6 Cal.4th [97,] 121 [1993].) The judgment must be set aside if the court finds prejudice under either test.
>
> The first of these tests is analogous to the general standard for harmless error analysis under California law. Under this standard, a finding of "inherent" likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this "inherent prejudice" test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information.
>
> But a finding that the information was "harmless" by appellate standards, and thus not "inherently" biasing, does not end the inquiry. Ultimately, the test for determining whether juror misconduct likely resulted in actual bias is "different from, and indeed less tolerant than," normal harmless-error analysis, for if it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict. (*People* v. *Marshall*, *supra*, 50 Cal.3d at p. 951.) Thus, even if the extraneous information was not so prejudicial, in and of itself, as to cause "inherent" bias under the first test, the totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose. Under this second, or "circumstantial," test, the trial record is not a dispositive consideration, but neither is it irrelevant. All pertinent portions of the entire record, including the trial record, must be considered. "The presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, *upon examining the entire record*, that there is no substantial likelihood that the complaining party suffered actual harm." (*People* v. *Hardy* (1992) 2 Cal.4th 86, 174, italics added.)

9 Cal.4th at 653-54.

but it renders this requirement meaningless by allowing relief to be denied on the ground that the factfinder was not actually biased (so there was no error to be either prejudicial or harmless) because "there is no substantial likelihood that the complaining party suffered actual harm." 9 Cal.4th at 654. The quoted language is the language of harmless error, and of a harmless-error standard which is constitutionally unacceptable in this context because it provides less protection than the standard of Chapman v. California.

The California Supreme Court's failure to apply properly the prejudice analysis of Chapman, which it did not cite, is consistent with its misapplication of harmless-error doctrines in many other capital cases.[6] In one such case, two members of this Court said that the state court's "cursory review is clearly insufficient..." Pensinger v. California, 502 U.S. 930, 931 (1991) (O'Connor, J., joined by Kennedy, J., dissenting from denial of certiorari), referring to People v. Pensinger, 52 Cal.3d 1210, 1271-72 (1991). Compare People v. Hamilton, 45 Cal.3d 351, 375-76 (1988), cert. denied, 488 U.S. 1047 (1989) (internally inconsistent and partially inaccurate instruction stating that person sentenced to life without parole might be considered for parole if his sentence were commuted was harmless error, because one part of the instruction told the jury not to consider topics discussed in other parts) with Hamilton v. Vasquez, 17 F.3d 1149, 1162-64 (9th Cir.), cert. denied, 114 S.Ct. 2706 (1994) (finding same error prejudicial on same record, because of presence of significant mitigating evidence, reference to the topic by the prosecutor in closing argument, and lengthy jury deliberations). Compare People v. Wade, 44 Cal.3d 975, 994-95, cert. denied, 488 U.S. 900 (1988) (omission of intent element from instruction on special circumstance establishing death-eligibility harmless, because it was included in instruction on similar but not identical theory of first-

6. Indeed, Chapman itself was a capital case in which this Court reversed a judgment of the California Supreme Court because that court had applied a state-law test of prejudice which was excessively tolerant of federal constitutional error. People v. Teale, 63 Cal.2d 178, 197 (1965).

degree murder liability) with Wade v. Calderon, 29 F.3d 1312, 1321-22 (9th Cir. 1994), cert. denied, 115 S.Ct. 923 (1995) (finding same error prejudicial on same record, because jury did not necessarily find first-degree murder on that theory). See generally C. Elliot Kessler, Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases -- A Comparison & Critique, 26 U.S.F. L. Rev. 41 (1991).[7] In a series of cases in which it found error under Skipper v. South Carolina, 476 U.S. 1 (1986), and Lockett v. Ohio, 438 U.S. 586 (1978), the California Supreme Court, while purporting to apply Chapman, improperly shifted the burden to the prosecution only after the defendant made an initial showing of prejudice from the record, in somewhat the same way it did here.[8]

7. Other examples are numerous, and cover the spectrum of possible constitutional errors in a capital case. See, e.g., People v. Roberts, 2 Cal.4th 271, 327-28, cert. denied, 113 S.Ct. 436 (1992) (at single trial, defendant-inmate sentenced to death for murder of another inmate and to life for murder of guard; instructional error regarding proximate cause required reversal of conviction for murder of guard but was not prejudicial as to penalty phase because in absence of error jury would still have been aware that guard died in the melee, and would have been aware of other aggravating evidence); In re Marquez, 1 Cal.4th 584, 604-05 (1992) (ineffective assistance of counsel, resulting in failure to discover 17 credible alibi witnesses, not prejudicial); People v. Morris, 53 Cal.3d 152, 228-32, cert. denied, 502 U.S. 959 (1991) (written instruction erroneously told jury that if they had a reasonable doubt between death and life without parole, they must impose life *with* [rather than *without*] parole; error harmless, even though jury asked for explanation of the instruction (at the same time they asked the consequences of a hung jury) and judge told them instruction was self-explanatory, because other instructions and closing argument referred to life *without* parole); People v. Sheldon, 48 Cal.3d 935, 951-52 (1989) (evidence erroneously admitted that defendant had previously shot at police officer and told his grandmother, "I tried to take one with me," but had been acquitted of attempted murder of officer; error harmless because jury was told of the acquittal, prosecutor did not discuss the incident in closing argument, and defense counsel argued possibility shot had been accidentally fired).

8. See, e.g., People v. Fudge, 7 Cal.4th 1075, 1118 (1994), cert. denied, 115 S.Ct. 1367 (1995) (retired prison warden who had interviewed defendant erroneously prevented from testifying that it was likely that defendant would adjust well as a life-term prisoner; error harmless because "the facts of defendant's crime provided powerful aggravating evidence"); People v. Whitt, 51 Cal.3d 620, 648 (1990), cert. denied, 501 U.S. 1213 (1991) (trial court prevented defense counsel from eliciting testimony from the defendant, at the penalty phase, in answer to the questions "Do you want to live?" and "Why do you deserve to live?," but error found harmless; "though the question ... *might* produce

(continued...)

The unusual disposition of the present case further demonstrates the California Supreme Court's pattern of applying Chapman erroneously. The court denied relief to Mr. Carpenter even as the court said "it seems prudent not to make a definitive determination" of whether or not Mr. Carpenter was prejudiced by the juror's misconduct. 10 Cal.4th at 256c (modifying 9 Cal.4th at 659). By requiring the prosecution to demonstrate that error is harmless beyond a reasonable doubt, Chapman requires a truly "definitive" determination that there has been no prejudice before Mr. Carpenter could be denied relief. See also 10 Cal.4th at 256d (modifying the dissenting opinion to assert, accurately, that the prosecution was prejudiced by the trial court's granting of habeas corpus, and thus entitled to prevail on appeal, if and only if Mr. Carpenter was not prejudiced by the juror's misconduct).

While purporting to defer to factual findings that the foreperson of the jury which convicted Mr. Carpenter and sentenced him to death was not an impartial juror, the California Supreme Court has held that he is nevertheless not entitled to a new trial. Certiorari should be granted because the prejudice analysis undertaken by the state court -- indeed, any prejudice analysis which could reach that result -- is inconsistent with the "structural error" analysis prescribed in Arizona v. Fulminante and Vasquez v. Hillery. Certiorari should also be granted because in this and other capital cases the California Supreme Court has applied to federal constitutional errors a

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8. (...continued)
a significant answer, ... we cannot know whether the defendant's actual response might have influenced the penalty determination"); People v. Robertson, 48 Cal.3d 18, 57, cert. denied, 493 U.S. 879 (1989) (trial court, acting as sentencer, expressly stated: "The Court does not consider the fact that [defendant] does not appear to pose a threat to society as long as he's confined to prison to be a factor either in aggravation or mitigation [of] punishment"; error harmless because trial court's emphasis on mutilation of victim shows that the mitigating evidence "could not have affected its penalty determination"); People v. McLain, 46 Cal.3d 97, 109 (1988), cert. denied, 489 U.S. 1072 (1989) (prison psychologist's testimony that "defendant would not pose a danger if spared [but incarcerated]" held to be error, but harmless because "excluded testimony would have had no marginal effect on the balance of aggravating and mitigating factors").

standard more tolerant of error than the "harmless beyond a reasonable doubt" standard prescribed by Chapman v. California.

* * * * *

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Supreme Court of California should be reversed.

Dated: September 14, 1995

Respectfully submitted,

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APPENDIX A

[No. S011273. Mar. 6, 1995.]

In re DAVID JOSEPH CARPENTER on Habeas Corpus.

SUMMARY

Defendant, who had been found guilty by a jury of multiple counts of murder and rape and had been sentenced to death, filed a petition for a writ of habeas corpus in superior court, challenging the judgment on the ground of the misconduct of a juror in obtaining extraneous information as to defendant's convictions and death sentences in a related case. The trial court granted the petition and vacated the judgment, and the state appealed directly to the Supreme Court. (Superior Court of San Diego County, No. HC 9906, Herbert B. Hoffman, Judge.)

The Supreme Court reversed the judgment granting the petition for a writ of habeas corpus, and denied the petition without prejudice to defendant to file a new petition in the Supreme Court in a manner consistent with the opinion. The court held that the superior court had subject matter jurisdiction over the habeas corpus proceeding, even though the automatic appeal from the challenged judgment was pending in the Supreme Court. However, the court held that the superior court erred in finding prejudice in the penalty phase of the murder prosecution resulting from the juror's misconduct. Although the United States Supreme Court has held that it is constitutionally impermissible to rest a death sentence on a determination made by a juror who has been led to believe that the responsibility for the defendant's death rests elsewhere than in that juror's determination, in a subsequent case, that court held that the admission of evidence regarding a defendant's prior death sentence did not affirmatively mislead the jury regarding its role in the sentencing process so as to diminish its sense of responsibility, and, therefore, did not contravene the principle established in the prior case. It also held that the admission of such evidence was not a denial of due process in view of the instructions describing the jurors' paramount role in determining the defendant's sentence and limiting the evidence they could consider. Thus, the superior court's finding was incorrect, at least without considering the instructions the jury was given and other relevant information from the trial. Similarly, the superior court erred in finding prejudice in the guilt phase of the murder prosecution on the ground that the extraneous information was inherently prejudicial in and of itself without reference to the rest of the record. The court also held that the circumstances surrounding the juror's misconduct did not necessarily reveal a substantial likelihood that the juror actually was impermissibly influenced by the outside information so as to support a determination of guilt phase prejudice from the misconduct. (Opinion by Arabian, J., with Baxter, George and Werdegar, JJ., concurring. Separate dissenting opinion by Mosk, J., with Lucas, C. J., and Kennard, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) **Habeas Corpus § 26—Jurisdiction—Superior Court—Attack on Judgment in Capital Case—When Automatic Appeal Pending in Supreme Court.**—The superior court had subject matter jurisdiction over a habeas corpus proceeding challenging a judgment of death, even though the automatic appeal from the same judgment was pending in the Supreme Court. Cal. Const., art. VI, § 10, grants original subject matter jurisdiction over habeas corpus proceedings concurrently to the superior court, the Court of Appeal, and the Supreme Court. Nothing in Cal. Const., art. VI, § 10, or any other provision of law deprives the superior court of subject matter jurisdiction over habeas corpus proceedings when the challenged judgment is pending on appeal before an appellate court or even when a judgment of death is pending on automatic appeal. Although capital cases are exclusively within the Supreme Court's appellate jurisdiction (Cal. Const., art. VI, § 11), they are not exclusively within that court's habeas corpus jurisdiction. And, although the superior court does not have the power to interfere with the appellate jurisdiction of either the Supreme Court or the Court of Appeal in matters pending before those courts, there was no such interference here. On habeas corpus, the superior court entertained only the claim of juror misconduct that did not appear of record, and the Supreme Court, in the exercise of its appellate jurisdiction, could not have considered that point.

[See 6 **Witkin & Epstein**, Cal. Criminal Law (2d ed. 1989) § 3335.]

(2) **Criminal Law § 652—Appellate Review—Harmless and Reversible Error—Jury Misconduct—Receipt of Information From Extraneous Sources—Bias of One Juror as Sufficient to Set Aside Conviction.**—Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors, a conviction cannot stand if

even a single juror has been improperly influenced by the receipt of information from extraneous sources.

(3a-3c) **Criminal Law § 652—Appellate Review—Harmless and Reversible Error—Jury Misconduct—Receipt of Information From Extraneous Sources—Tests to Determine Prejudicial Effect.**—When jury misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias, which can appear either if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror, or if, based on the nature of the misconduct and the surrounding circumstances, it is substantially likely the juror was actually biased against the defendant. The judgment must be set aside if the court finds prejudice under either test. Under the first test, which is analogous to the general standard for harmless error analysis, a finding of inherently likely bias is required when, and only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. But the second test is different from, and indeed less tolerant than, normal harmless error analysis, for if it appears substantially likely that a juror is actually biased, the court must set aside the verdict, no matter how convinced it might be that an unbiased jury would have reached the same verdict.

[Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal, note, 46 A.L.R.4th 11. See also 6 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 3016A.]

(4a, 4b) **Criminal Law § 652—Appellate Review—Harmless and Reversible Error—Jury Misconduct—Receipt of Information From Extraneous Sources—Tests to Determine Prejudicial Effect—Use of Trial Record—What Constitutes "Entire Record."**—In a jury misconduct case involving the receipt of information from extraneous sources, application of the "inherent prejudice" test to determine the existence of juror bias depends on a review of the trial record to determine the prejudicial effect of the extraneous information. Under the "circumstantial" test to determine bias, the trial record is not a dispositive consideration, but neither is it irrelevant. All pertinent portions of the entire record, including the trial record, must be considered. The presumption of prejudice may be rebutted, inter alia, by a

reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm. The "entire record" logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant. For example, the stronger the evidence, the less likely it is that the extraneous information itself influenced the verdict.

(5) **Criminal Law § 652—Appellate Review—Harmless and Reversible Error—Jury Misconduct—Receipt of Information From Extraneous Sources—Capital Case—Knowledge of Defendant's Conviction and Death Sentence in Related Case—Prejudicial Effect in Penalty Phase of Trial.**—In a habeas corpus proceeding, the trial court erred in finding prejudice in the penalty phase of a capital murder prosecution resulting from the misconduct of a juror in obtaining extraneous information as to defendant's convictions and death sentences in a related case. Although the United States Supreme Court has held that it is constitutionally impermissible to rest a death sentence on a determination made by a juror who has been led to believe that the responsibility for the defendant's death rests elsewhere than in that juror's determination, in a subsequent case, that court held that the admission of evidence regarding a defendant's prior death sentence did not affirmatively mislead the jury regarding its role in the sentencing process so as to diminish its sense of responsibility, and, therefore, did not contravene the principle established in the prior case. It also held that the admission of such evidence was not a denial of due process in view of the instructions describing the jurors' paramount role in determining the defendant's sentence and limiting the evidence they could consider. Thus, the trial court's finding was incorrect, at least without considering the instructions the jury was given and other relevant information from the trial.

(6) **Criminal Law § 652—Appellate Review—Harmless and Reversible Error—Jury Misconduct—Receipt of Information From Extraneous Sources—Capital Case—Knowledge of Defendant's Conviction and Death Sentence in Related Case—Prejudicial Effect in Guilt Phase of Trial—Inherent Prejudice.**—In a habeas corpus proceeding, the trial court erred in finding prejudice in the guilt phase of a capital murder prosecution resulting from the misconduct of a juror in obtaining extraneous information as to defendant's convictions and death sentences in a related case on the ground that the extraneous information was inherently prejudicial in and of itself without reference to the

rest of the record. The trial court stated that the evidence of guilt was "overwhelming," and it was not legally precluded from considering this evidence. Although once actual bias is found, the strength of the evidence is irrelevant and the verdict must be set aside, such evidence is relevant in determining bias in the first place. If the evidence was truly overwhelming, the extraneous information could not be considered "inherently" prejudicial, particularly since evidence of most of the crimes committed in the other case was presented to the jury. All the juror learned out of court was the verdict of the first jury. Moreover, that the trial court barred evidence of the prior verdict as substantially more prejudicial than probative, although relevant, was not itself dispositive of the determination after trial of the prejudicial effect of the jury's acquisition of that evidence.

(7) **Criminal Law § 652—Appellate Review—Harmless and Reversible Error—Jury Misconduct—Receipt of Information From Extraneous Sources—Capital Case—Knowledge of Defendant's Conviction and Death Sentence in Related Case—Prejudicial Effect in Guilt Phase of Trial—As Creating Substantial Likelihood of Actual Juror Bias.**—In a capital murder prosecution, the circumstances surrounding the misconduct of a juror in obtaining extraneous information as to defendant's convictions and death sentences in a related case did not necessarily reveal a substantial likelihood that the juror actually was impermissibly influenced by the outside information so as to support a determination of guilt phase prejudice from the misconduct. Although the juror's learning of the secret was unfortunate, it did not itself show bias. Her failure to report what she had learned was misconduct, but it was passive. That she told nonjurors what she knew and, after the verdict, denied the misconduct did not mean that she thereby failed to base her verdict solely on the evidence. Also, there was no evidence that she told any fellow jurors what she had learned, and it had to be assumed that she did not, since the initial burden was on defendant to prove the misconduct. The fact that she did not tell other jurors tended to negate the inference that she was biased, since a biased juror would likely have told other jurors what she had learned, and it tended to show that she intended the forbidden information not to influence the verdict.

(8) **Criminal Law § 652—Appellate Review—Harmless and Reversible Error—Jury Misconduct—Necessity for State to Present Affirmative Evidence of Lack of Prejudice.**—On appeal from the granting of a writ of habeas corpus vacating the judgment and death sentence in a murder prosecution, the fact that the state did not present affirmative

evidence in the trial court showing there had been no prejudice from the misconduct of a juror in obtaining extraneous information as to defendant's convictions and death sentences in a related case, was not dispositive of the existence of prejudice based on a substantial likelihood that the juror actually was impermissibly influenced by the outside information. The presumption of prejudice may be rebutted by an affirmative evidentiary showing or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct. The presumption of prejudice merely excuses the defendant from affirmatively proving prejudice when that cannot be done. The presumption prevails unless the contrary appears. The evidence of the habeas corpus evidentiary hearing did not itself compel a finding of bias. The juror had not concealed information during jury selection, and there was no evidence that she had prejudged the case. A review of the entire record could show the extrinsic information was not prejudicial.

(9) **Criminal Law § 683—Appellate Review—Determination and Disposition of Cause—Appeal From Grant of Habeas Corpus Vacating Death Sentence—Reversal—Provisional Denial of Petition Without Prejudice to Filing of New Petition Based on Combined Habeas Corpus and Trial Records: Habeas Corpus § 38—Appeal.**—The proper disposition of an appeal to the Supreme Court from the granting of a writ of habeas corpus vacating the judgment and death sentence in a murder prosecution, upon determining that the trial court erred in finding prejudice from the misconduct of a juror in obtaining extraneous information as to defendant's convictions and death sentences in a related case, was to reverse the trial court's granting of relief and provisionally deny the habeas corpus petition, but without prejudice to defendant to file a new petition in the Supreme Court raising the issue in a manner consistent with the court's opinion, and based on the combined records of the habeas corpus proceeding and the underlying trial. Posttrial prejudice is a mixed question of law and fact ultimately determined by the reviewing court, and, since there was a full factual record with all conflicts in the evidence resolved and with the relevant historical facts found, remand was not appropriate. However, the Supreme Court had not yet fully reviewed the entire record, since, even though it had taken judicial notice of the record of the underlying trial, which gave it a general idea of what the trial was about, such was inadequate to the task of making a final determination of prejudice. Thus, it was prudent not to make a definitive determination of prejudice, but to reserve it until the complete appellate record was before the court.

COUNSEL

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OPINION

ARABIAN, J.—The Director of Corrections appeals a superior court judgment and order on habeas corpus vacating an earlier superior court judgment against David Joseph Carpenter, including a sentence of death. We reverse.

I. THE BACKGROUND

A. *The Santa Cruz "Trailside Murder" Case*

In the Santa Cruz Superior Court, the People charged Carpenter with the following offenses committed in that county in the spring of 1981: (1) the murder of Ellen Marie Hansen under special circumstances of rape murder, lying in wait, and multiple murder; (2) the attempted rape of Hansen; (3) the attempted murder of Steven Russell Haertle with personal use of a firearm and infliction of great bodily injury; (4) the murder of Heather Scaggs under special circumstances of rape murder and multiple murder; and (5) the rape of Scaggs. Carpenter pleaded not guilty.

Following a change of venue because of pretrial publicity, a jury trial was held in Los Angeles County. The jury found Carpenter guilty on all charges, with the murders in the first degree, and found each of the allegations true. After the penalty phase, it returned a verdict of death, and the superior court imposed that sentence. Carpenter's automatic appeal to this court is pending.

B. *The Marin "Trailside Murder" Case*

In a separate action, the one underlying this appeal, the People charged Carpenter with the following offenses committed in Marin County in the fall of 1980: (1) the murder of Cynthia Toshiko Moreland with personal use of a firearm; (2) the murder of Richard Edward Stowers with personal use of a

firearm; (3) the murder of Anne Evelyn Alderson under the special circumstance of rape murder and with personal use of a firearm; (4) the rape of Alderson with personal use of a firearm; (5) the murder of Diane Marie O'Connell under the special circumstance of rape murder and with personal use of a firearm; (6) the attempted rape of O'Connell with personal use of a firearm; (7) the murder of Shauna Catherine May under the special circumstance of rape murder and with personal use of a firearm; and (8) the rape of May with personal use of a firearm. The special circumstance of multiple murder was also charged. Carpenter pleaded not guilty.

After the trial for the Santa Cruz crimes, and following a change of venue because of pretrial publicity, jury trial in this case commenced in San Diego Superior Court. Prior to trial, the court ruled on the admissibility of evidence of the Santa Cruz "Trailside Murders." Both parties theorized that the same person committed both sets of crimes; the issue at trial was whether that person was Carpenter. For the guilt phase, the court permitted evidence of the facts underlying these offenses except those against Scaggs; it excluded the latter as, inter alia, substantially more prejudicial than probative under Evidence Code section 352. For the penalty phase, it permitted evidence of the facts underlying all the offenses. For both phases, it barred evidence of Carpenter's convictions and death sentences as substantially more prejudicial than probative.

Throughout jury selection and trial, the court continually admonished the prospective jurors and then jury, in accordance with Penal Code section 1122, that "it [was] their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause [was] finally submitted to them," and to avoid publicity relating to the case. It admonished them to immediately advise any person attempting to discuss the case with them that they could not do so, and to immediately report the matter if such person should persist.

Barbara Durham was selected as one of the 12 jurors, and became the foreperson. On voir dire, she stated that she had not heard of the "Trailside Murders." She and the other 11 jurors evidently swore, in conformity with the oath prescribed by statute, that she would "well and truly try" the cause and "a true verdict render according to the evidence." (Code Civ. Proc., former § 604, enacted 1872, repealed Stats. 1988, ch. 1245, § 7, p. 4155; accord, *id.*, § 232, subd. (b).)

During the guilt phase, evidence of the facts underlying the Santa Cruz crimes, except the Scaggs offenses, featured prominently, but evidence of the verdicts was not presented. The jury found Carpenter guilty on all

charges, with the murders in the first degree, and found each of the allegations true. During the penalty phase, evidence of the facts underlying the Santa Cruz crimes, including the Scaggs offenses, but not the verdicts, was introduced. The jury returned a verdict of death, and the superior court imposed that sentence. Carpenter's automatic appeal is pending in this court.

II. The Habeas Corpus Proceeding

Carpenter filed a petition for writ of habeas corpus in the San Diego Superior Court challenging the judgment in the Marin "Trailside Murder" case shortly after its rendition. He alleged that Juror Durham had committed prejudicial misconduct during trial. The matter was assigned to the trial judge, who issued an order to show cause why relief should not be granted. After a return—which challenged the jurisdiction of the superior court and denied the allegations of misconduct—and traverse were filed, the court ordered an evidentiary hearing. Carpenter presented extensive evidence, mainly through the testimony of Michael Lustig and Donna Duran. The respondent also presented extensive evidence, mainly through Juror Durham and her husband Ronald.

The court characterized the evidentiary hearing as a "classic credibility contest" between Lustig and Duran on one side, and the Durhams on the other. It found Lustig's testimony "credible . . . in almost all respects," and Duran's credible in all respects. It doubted the testimony of the Durhams, and found that of Juror Durham, in its general denial of misconduct, perjurious.

From all the evidence, the court determined that Juror Durham had committed misconduct by receiving information outside of court relating to the convictions and death sentence for the Santa Cruz crimes. By March 26, 1988, in the middle of the guilt phase, she had received the forbidden information from newspaper accounts, either directly or through her husband. Until at least March 26, 1988, the couple received delivery of a newspaper at their home. They had falsely stated in their original declarations that they had canceled their subscription around the opening of the guilt phase. Instead, they ordered cancellation on, or as of, March 26, 1988. At all relevant times, they were experiencing drinking problems and marital troubles. Ronald openly criticized the trial as a waste of time and money, having learned that Carpenter had already been convicted and sentenced to death for the Santa Cruz crimes. The "situation" was "very explosive," presenting an "opportunity for a verbal battle between husband and wife while parties have been drinking." "[O]n many occasions he apparently told her when she would come home from this trial, . . . 'I know so much more about this case than you do.' [¶] . . . I don't know what would provoke that kind of response unless Mrs. Durham is somehow talking about aspects of the case." He had the "opportunity . . . to let his wife know in no uncertain terms that you're just wasting your time on this trial because Mr. Carpenter has already got the death sentence and he's been convicted of similar crimes."

The superior court also found that Juror Durham had committed misconduct by discussing the case pending before her and Carpenter's Santa Cruz convictions and death sentence with nonjurors, including Lustig and Duran. On March 26, 1988, Lustig, Duran and others were having dinner at a resort in San Diego County. Lustig invited the Durhams, who were social acquaintances but not close friends, to his table. At Lustig's table, Juror Durham initiated a five- or ten-minute conversation about the Marin case. She stated something like the jury was not supposed to know this, but Carpenter had already been convicted and sentenced to death for the Santa Cruz crimes. The court found Juror Durham to be "very outspoken," and to have "no hesitancy talking about her marital problems" even "with a virtual stranger . . . . And . . . that's somewhat similar to the fact that she would share with a stranger her confidential information about this case." "[S]he wanted to be the center of attention that night, and that kind of disclosure placed her in the center of attention with the Lustig[] party. She admitted she had discussed the Marin case with Lustig and Duran, but denied revealing that she knew the forbidden information and knew it was forbidden. The court did not credit this.

Having found misconduct, the court ordered a separate hearing on prejudice. At that hearing, the parties presented extensive argument but did not introduce new evidence. In a detailed ruling, the court found prejudice. It stated at the outset that it was applying the analysis of *People* v. *Martinez* (1978) 82 Cal.App.3d 1 [147 Cal.Rptr. 208], which held that whether a defendant has been prejudiced by a jury receiving evidence outside of court "depends upon whether the jury's impartiality has been adversely affected, whether the prosecution's burden of proof has been lightened and whether any asserted defense has been contradicted." (*Id.* at p. 22.) The court analyzed prejudice at the penalty phase first, then at the guilt phase.

Regarding penalty, the court analogized the receipt of the information to error under *Caldwell* v. *Mississippi* (1985) 472 U.S. 320 [86 L.Ed.2d 231, 105 S.Ct. 2633], which, the trial court stated, "held that it's constitutionally impermissible to rest a death sentence on a determination made by a juror who has been led to believe that the responsibility for the defendant's death rests elsewhere [than] in that juror's determination." The court found that the

juror's knowledge of the other death sentence "would serve to minimize her sense of responsibility in making the difficult and uncomfortable penalty determination," and that therefore she "would have her impartiality compromised against the defendant by knowing that another jury of 12 has concluded that he is a person worthy of the death sentence and that would affect her decision." The court found that the prosecution's burden had been lightened because "there's no way that she could have given that the same kind of consideration knowing on one hand that the defendant already had been sentenced to death by another jury." Because of this, the court found that the prosecution had not rebutted the presumption of prejudice.

The court then turned to the guilt phase. It stated that the evidence of guilt was "overwhelming," but that because the defendant was entitled to trial by an unbiased jury, the "usual harmless error tests" did not apply. Therefore, "with respect to the guilt phase, to rebut the presumption of prejudice the People must show that Mrs. Durham remained impartial despite her knowledge of appellant's other convictions for similar crimes and death sentence, and also, as the *Martinez* test states, the prosecution's burden of proof was not lightened, and that no assertive defenses had been contradicted. That is a factual situation, and the likelihood of the same verdict despite the misconduct is of no consequence." The court could not find "that the misconduct . . . and the information she received was innocuous or of a trivial nature. I would find that the extrajudicial information that caused her misconduct was inherently prejudicial." "[T]he nature of the information was such that the juror's impartiality could not be anything but adversely affected." The fact the juror knew that defendant "was the kind of person that 12 other people . . . chose to sentence to death . . could not but affect her determination of whether or not she could remain a fair and impartial juror as to this case and in evaluating the evidence and also his own testimony. So I definitely believe it affects her impartiality."

The court estimated that about two-thirds of the guilt phase evidence was directed to proving the Santa Cruz County crimes, and one-third to proving the Marin County crimes. It felt the improper knowledge was "highly prejudicial" and lightened the prosecution's burden because of the "unique aspect of the case" that "it was conceded by the defense and argued by the prosecution that one person committed both the Santa Cruz and the Marin murders." For the same reason, the court found that the juror's knowledge undermined the defense that defendant "was not the trailside killer." The court noted that it had done everything it could to keep the jury from learning of the earlier verdict. "And despite everything that was done by way of evidentiary rulings and the like, this is exactly the information that Mrs. Durham had."

For these reasons, the court "reluctantly" stated it had "no alternative than to grant the petition for writ of habeas corpus in its entirety . . . ." It further stated that "because of the gravity of the crimes themselves . . . I would find beyond a reasonable doubt that any jury would have sentenced the defendant to the death penalty based upon the evidence presented and would also find that the evidence was so overwhelming with respect to defendant's guilt that if . . . you could apply the harmless error standard to juror misconduct, I would find that her knowledge would be harmless beyond a reasonable doubt because of the overwhelming nature of the evidence in this case and as well as the overwhelming proof of the gravity of the aggravating circumstances in the penalty phase so completely outweighed and dominated the mitigation factors that the jury would make that result." Because of this, the court felt that it was "an absolute travesty that such a result could happen to such a case." The court also stated its intent to inform the San Diego District Attorney and the Attorney General of the situation and its belief that "the matter should be reviewed for possible prosecution under Penal Code section 96 [stating the punishment for specified jury misconduct]."

The superior court then granted the petition for writ of habeas corpus and vacated the judgment. The Director of Corrections appealed directly to this court. (Pen. Code, § 1506.)

III. Discussion

The Attorney General, representing the Director of Corrections, challenges both the jurisdiction of the superior court over this matter and its ruling on the merits. We address both contentions.

A. *Subject Matter Jurisdiction*

(1) The Attorney General first argues the superior court did not have subject matter jurisdiction over the habeas corpus proceeding challenging the Marin "Trailside Murder" judgment because the automatic appeal from the same judgment is pending in this court. We disagree.

Section 10 of article VI of the California Constitution (hereafter article VI, section 10) provides in pertinent part: "The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings." This provision grants original subject matter jurisdiction over habeas corpus proceedings concurrently to the superior court, the Court of Appeal, and this court. (E.g., *France* v. *Superior Court* (1927) 201 Cal. 122, 131 [255 P. 815, 52 A.L.R. 869] [decided under former §§ 4 & 5 of art. VI of Cal. Const., which were the substantially similar predecessors of present

art. VI, § 10]; *People* v. *Mayfield* (1993) 5 Cal.4th 220, 224-225 [following *France* under present art. VI, § 10].)

Nothing in article VI, section 10, or any other provision of law, denies the superior court of subject matter jurisdiction over habeas corpus proceedings when the challenged judgment is pending on appeal before an appellate court or even when, as here, a judgment of death is pending on automatic appeal before this court. None of the authorities the Attorney General cites holds to the contrary. As to his policy arguments, the superior court's original, concurrent subject matter jurisdiction over habeas corpus proceedings is a "policy" declared in the California Constitution. It must be implemented by the judiciary. We agree with the Attorney General that "[c]apital cases are different." They are exclusively within our appellate jurisdiction. (Cal. Const., art. VI, § 11.) But they are not exclusively within our *habeas corpus* jurisdiction. To the extent that the Attorney General quarrels with the superior court's determination that its exercise of subject matter jurisdiction was appropriate in view of "the interests of justice, judicial economy, and the avoidance of potentially prejudicial delay to both parties," we also disagree.

This is not to say that the superior court may exercise its subject matter jurisdiction over habeas corpus proceedings wherever such jurisdiction extends. It does not have "the power to interfere with the appellate jurisdiction of either [this court or the Court of Appeal] in matters pending before said appellate courts . . . ." (*France* v. *Superior Court*, *supra*, 201 Cal. at p. 132; accord, *People* v. *Mayfield*, *supra*, 5 Cal.4th at p. 225.) There was no such interference here. On habeas corpus, the superior court entertained only the claim of juror misconduct *that did not appear of record*. In the exercise of our appellate jurisdiction, we could not consider that point. Appellate jurisdiction is limited to the four corners of the record on appeal (e.g., *People* v. *Merriam* (1967) 66 Cal.2d 390, 396-397 [58 Cal.Rptr. 1, 426 P.2d 161], disapproved on another point, *People* v. *Rincon-Pineda* (1975) 14 Cal.3d 864, 882 [123 Cal.Rptr. 119, 538 P.2d 247, 92 A.L.R.3d 845])—which, in this case, does not include the evidence of misconduct. We thus conclude the superior court had jurisdiction over this matter.

B. *Prejudicial Juror Misconduct*

The Attorney General does not challenge, and we accept, the superior court's findings of historical fact, which resolved a credibility dispute. In essence, during the trial, the juror in question learned forbidden information but did not report it, then told some nonjurors at a party that the jurors were not supposed to know, but Carpenter had already been convicted and sentenced to death for the Santa Cruz crimes, and then lied about it when

confronted after trial. The Attorney General also does not deny that these facts establish misconduct. They clearly do. It is improper for a juror to receive information outside of court about the pending case, and to discuss the case with nonjurors. (E.g., *In re Hitchings* (1993) 6 Cal.4th 97, 116-118 [24 Cal.Rptr.2d 74, 860 P.2d 466]; *People* v. *Holloway* (1990) 50 Cal.3d 1098, 1108 [269 Cal.Rptr. 530, 790 P.2d 1327].) But he argues the court erred in its finding that the misconduct was prejudicial. We agree.

In considering this question, we first review the applicable law, then apply it to this case.

1. *The Applicable Law*

Carpenter relies heavily on a trio of recent decisions by this court which state the test for determining prejudice from juror misconduct. (*In re Hitchings*, *supra*, 6 Cal.4th 97; *People* v. *Holloway*, *supra*, 50 Cal.3d 1098; *People* v. *Marshall* (1990) 50 Cal.3d 907 [269 Cal.Rptr. 269, 790 P.2d 676].) We will address these and other California cases in due course, but we begin by discussing some decisions of the United States Supreme Court that will help place this issue into context, and point the way to the proper application of the test we have established.

The first, *Smith* v. *Phillips* (1982) 455 U.S. 209 [71 L.Ed.2d 78, 102 S.Ct. 940], involved facts that in some respects are more troubling than those here. The defendant was convicted by jury of crimes in state court. During the trial, one of the actual jurors applied "for employment as a major felony investigator in the District Attorney's Office." (*Id.* at p. 212 [71 L.Ed.2d at p. 83].) When the defendant learned of this after trial, he unsuccessfully moved to set aside the verdict. The trial court found that the employment application " 'was indeed an indiscretion,' " but it did not indicate prejudice against the defendant or an inability to decide guilt or innocence " 'solely on the evidence.' " (*Id.* at pp. 213-214 [71 L.Ed.2d at p. 84].)

The high court found no constitutional infirmity in the verdict despite the obvious inherent motivation the job applicant may have had to reach a verdict favorable to the prospective employer. It rejected the argument that "the law must impute bias to jurors" in that position, stating that the "Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove *actual* bias." (*Smith* v. *Phillips*, *supra*, 455 U.S. at p. 215 [71 L.Ed.2d at p. 85], italics added.) The court reviewed prior decisions and concluded that they "demonstrate that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would

be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; *it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.* Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (*Id.* at p. 217 [71 L.Ed.2d at p. 86], italics added.)

In *Rushen* v. *Spain* (1983) 464 U.S. 114 [78 L.Ed.2d 267, 104 S.Ct. 453], the court considered the effect on a verdict of improper ex parte communications between the trial court and jurors during a lengthy trial. It took a similarly pragmatic approach. "Our cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant. [Fn. omitted.] 'At the same time and without detracting from the fundamental importance of [these rights], we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving [such constitutional] deprivations are [therefore] subject to the general rule that remedies should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interests.' [Citations.]" (*Id.* at pp. 117-118 [78 L.Ed.2d at pp. 272-273].)

The high court stated, "There is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial. The . . . conclusion that an unrecorded *ex parte* communication between trial judge and juror can never be harmless error *ignores these day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice.*" (*Rushen* v. *Spain*, *supra*, 464 U.S. at pp. 118-119 [78 L.Ed.2d at p. 273], quoted with approval in *People* v. *Wright* (1990) 52 Cal.3d 367, 402-403 [276 Cal.Rptr. 731, 802 P.2d 221], italics added.) As an example, the court noted that "we have refused, on facts more troublesome than these, to find inherent bias in a verdict when a state trial court determined 'beyond a reasonable doubt' that a juror's out-of-court action did not influence the verdict." (*Rushen* v. *Spain*, *supra*, 464 U.S. at p. 119, fn. 3 [78 L.Ed.2d at p. 273], citing *Smith* v. *Phillips*, *supra*, 455 U.S. 209.)

McDonough Power Equipment, Inc. v. *Greenwood* (1984) 464 U.S. 548 [78 L.Ed.2d 663, 104 S.Ct. 845] involved a juror who failed to disclose certain information during voir dire. In holding that a new trial is not required "unless the juror's failure to disclose denied respondents their right to an impartial jury" (*id.* at p. 549 [78 L.Ed.2d at p. 667]), the high court noted, "Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials. It seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing caseload." (*Id.* at p. 553 [78 L.Ed.2d at p. 669].)[1]

A decision last term, *Romano* v. *Oklahoma* (1994) 512 U.S. — [129 L.Ed.2d 1, 77 S.Ct. 1], is significant given the trial court's characterization of the misconduct here as error under *Caldwell* v. *Mississippi*, *supra*, 472 U.S. 320. In *Romano*, the petitioner, like Carpenter, was charged and tried separately for separate capital offenses. In the first trial, the jury found the petitioner guilty of murder and sentenced him to death. A different jury then convicted him of a second murder and also sentenced him to death. During the sentencing phase of the second trial, evidence of the first murder was presented. Additionally, *evidence of the first conviction and death sentence* was also presented to the jury—erroneously but harmlessly, the state appellate court later held. While appeal of the second judgment was pending, the first conviction was reversed on direct appeal. After the state court affirmed the second judgment, the high court granted certiorari and then affirmed. Distinguishing and limiting *Caldwell* v. *Mississippi*, *supra*, 472 U.S. 320, the court did "not believe that the admission of evidence regarding petitioner's prior death sentence affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility. The admission of this evidence, therefore, did not contravene the principle established in *Caldwell*." (*Romano* v. *Oklahoma*, *supra*, 512 U.S. at p. — [129 L.Ed.2d at p. 11].)

The court also rejected other constitutional challenges to the evidence. Regarding a due process challenge under the Fourteenth Amendment, the court stated that the "relevant question in this case . . . is whether the admission of evidence regarding petitioner's prior death sentence so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." (*Romano* v. *Oklahoma*, *supra*, 512 U.S. at p. — [129 L.Ed.2d at p. 13].) It found no such unfairness. "[I]f the jurors followed the trial court's instructions, which we presume they did [citation], this evidence should have had little—if any—effect on their

[1]Seven justices joined the lead opinion in *McDonough Power Equipment, Inc.* v. *Greenwood*, *supra*, 464 U.S. 548. Justice Blackmun, speaking for himself and two other justices, "join[ed] the Court's opinion," but also wrote a short concurring opinion. (*Id.* at pp. 556-557 [78 L.Ed.2d at pp. 671-672]; see *In re Hitchings*, *supra*, 6 Cal.4th at p. 115, fn. 5.) Nothing in that separate opinion suggests disagreement with the language quoted in the text.

deliberations. Those instructions clearly and properly described the jurors' paramount role in determining petitioner's sentence, and they also explicitly limited the jurors' consideration of aggravating factors to the four which the State sought to prove. Regardless of the evidence as to petitioner's death sentence in the [first] case, the jury had sufficient evidence to justify its conclusion that these four aggravating circumstances existed. . . . In short, the instructions did not offer the jurors any means by which to give effect to the evidence of petitioner's sentence in the [first] murder, and the other relevant evidence presented by the State was sufficient to justify the imposition of the death sentence in this case." (*Id.* at p. — [129 L.Ed.2d at pp. 13-14].)

In a discussion particularly pertinent here, the high court concluded, "Even assuming that the jury disregarded the trial court's instructions and allowed the evidence of petitioner's prior death sentence to influence its decision, it is impossible to know how this evidence might have affected the jury. It seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so. Either conclusion necessarily rests upon one's intuition. To hold on the basis of this record that the admission of evidence relating to petitioner's sentence in the [first] case rendered petitioner's sentencing proceeding for the [second] murder fundamentally unfair would thus be an exercise in speculation, rather than reasoned judgment." (*Romano* v. *Oklahoma*, *supra*, 512 U.S. at p. — [129 L.Ed.2d at p. 14].)

With these decisions as a backdrop, we now consider the cases on which Carpenter relies. In *People* v. *Marshall*, *supra*, 50 Cal.3d at pages 949-950, one juror told the other jurors during deliberations that he had a law enforcement background, and stated legal principles that were both extraneous and erroneous. We found this to be misconduct giving rise to a presumption of prejudice, but also stated, "The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. '[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors.' [Citation.] Moreover, under that 'standard' few verdicts would be proof against challenge." (*Id.* at p. 950.)

We then stated the test to apply in determining whether juror misconduct requires the judgment be set aside: "A judgment adverse to a defendant in a

criminal case must be reversed or vacated 'whenever . . . the court finds a *substantial likelihood* that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury.' [Citations.] . . . [¶] 'The ultimate issue of influence on the juror is resolved by reference to the substantial likelihood test, an objective standard. In effect, the court must examine the extrajudicial material and then judge whether it is *inherently likely* to have influenced the juror.' [Citation.]" (*People* v. *Marshall*, *supra*, 50 Cal.3d at pp. 950-951, italics added.) We noted that this prejudice analysis is "different from, and indeed less tolerant than, 'harmless-error analysis' for ordinary error at trial. The reason is as follows. Any deficiency that undermines the integrity of a trial—which requires a proceeding at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury—introduces the taint of fundamental unfairness and calls for reversal without consideration of actual prejudice. [Citation.] Such a deficiency is threatened by jury misconduct. When the misconduct in question supports a finding that there is a substantial likelihood that at least one juror was impermissibly influenced to the defendant's detriment, we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial. By contrast, when the misconduct does not support such a finding, we must hold it nonprejudicial." (*Id.* at p. 951.)

Applying this test, we found the misconduct harmless. (*People* v. *Marshall*, *supra*, 50 Cal.3d at pp. 951-952.)

In *People* v. *Holloway*, *supra*, 50 Cal.3d 1098, one juror improperly read a newspaper article during trial stating that the defendant had been on parole from prison for assaulting a woman with a hammer. This impropriety was not discovered until after the guilt phase verdicts. We noted that such misconduct gives rise to a presumption of prejudice, and discussed the significance of that presumption: " '[W]hen misconduct of jurors is shown, it is presumed to be injurious to defendant, *unless the contrary appears.*' [Citation.] We have long recognized the reason for this rule: 'A juror is not allowed to say: "I acknowledge to grave misconduct. I received evidence without the presence of the court, but those matters had no influence upon my mind when casting my vote in the jury-room." The law, in its wisdom, does not allow a juror to purge himself in that way. . . . "But, where . . . without any fault of either party . . . , a paper was communicated to the jury which might have influenced their minds, the testimony of the jurors is [not admissible] to show whether it did or did not influence their deliberations and decision. A juryman may testify to any facts bearing upon the

question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind." ' (*People* v. *Stokes* [(1894) 103 Cal. 193, 196-197 (37 P. 207)].) That principle is now embodied in Evidence Code section 1150." (*People* v. *Holloway*, *supra*, 50 Cal.3d at pp. 1108-1109, italics added; see also *People* v. *Cooper* (1991) 53 Cal.3d 771, 835-836 [281 Cal.Rptr. 90, 809 P.2d 865] ["When a person violates his oath as a juror, doubt is cast on that person's ability to otherwise perform his duties."].)

The defendant need not affirmatively prove the jury's deliberations were improperly affected by the misconduct, for that cannot be done under Evidence Code section 1150 and the authority cited in *People* v. *Holloway*, *supra*, 50 Cal.3d at pages 1108-1109. Therefore, " 'The presumption of prejudice is an evidentiary aid to those parties who are able to establish serious misconduct of a type likely to have had an effect on the verdict or which deprived the complaining party of thorough consideration of his case, yet who are unable to establish by a preponderance of the evidence that actual prejudice occurred. The law thus recognizes the substantial barrier to proof of prejudice which Evidence Code section 1150 erects, and it seeks to lower that barrier somewhat.' (*Hasson* v. *Ford Motor Co.* (1982) 32 Cal.3d 388, 416 [185 Cal.Rptr. 654, 650 P.2d 1171].)" (*Id.* at p. 1109.)

We then applied the test of *People* v. *Marshall*, *supra*, 50 Cal.3d 907, and found the misconduct prejudicial. "The content of the article was extremely prejudicial; it revealed information about defendant's prior criminal conduct that the court had ruled inadmissible because of its potential for prejudice. The court and counsel had gone to great lengths to avoid having the jury learn of defendant's prior conviction for having assaulted a woman with a hammer. Their efforts were to no avail as to one juror—a fact that they did not learn until after it was too late to take any curative steps. [¶] . . . [¶] . . . [T]he defense went through the entire guilt phase thinking that the jury was unaware of defendant's prior record when in fact one juror had such knowledge. We cannot say at this point that [the juror's] improper knowledge had no impact. . . . [¶] Under the circumstances, we are unable to conclude that the presumption of prejudice has been rebutted." (*People* v. *Holloway*, *supra*, 50 Cal.3d at pp. 1110-1111.)

We also made clear that even one biased juror requires overturning the verdict. "Defendant was entitled to be tried by 12, not 11, impartial and unprejudiced jurors. (2) 'Because a defendant charged with crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' [Citations.]" (*People* v. *Holloway*, *supra*, 50 Cal.3d at p. 1112.)

We did not hold, however, that the improper receipt of *any* potentially prejudicial information required reversal. "Our conclusion might have been different . . . if the information improperly obtained . . . had been less prejudicial." (*People* v. *Holloway*, *supra*, 50 Cal.3d at pp. 1111-1112.)

Our most recent decision involving juror misconduct was *In re Hitchings*, *supra*, 6 Cal.4th 97. There, during voir dire, a juror intentionally concealed knowledge she had about the case and, during the guilt trial, she made statements to a nonjuror indicating that she already believed the defendant was guilty. (*Id.* at pp. 116, 117.) This was clearly misconduct giving rise to the presumption of prejudice. "This presumption of prejudice ' "may be rebutted by an affirmative evidentiary showing that prejudice does not exist *or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm* to the complaining party [resulting from the misconduct]. . . ." ' " (*Id.* at p. 119, quoting *People* v. *Miranda* (1987) 44 Cal.3d 57, 117 [241 Cal.Rptr. 594, 744 P.2d 1127], which itself quoted *Hasson* v. *Ford Motor Co.* (1982) 32 Cal.3d 388, 417 [185 Cal.Rptr. 654, 650 P.2d 1171], italics added.) We found the presumption had not been rebutted because the evidence showed it to be " 'reasonably probable' [the juror] had prejudged the case." (*In re Hitchings*, *supra*, 6 Cal.4th at p. 121.)

(3a) To summarize, when misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. (E.g., *People* v. *Holloway*, *supra*, 50 Cal.3d at pp. 1110-1112; *People* v. *Marshall*, *supra*, 50 Cal.3d at pp. 951-952.) Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. (E.g., *In re Hitchings*, *supra*, 6 Cal.4th at p. 121.) The judgment must be set aside if the court finds prejudice under either test.

The first of these tests is analogous to the general standard for harmless-error analysis under California law. Under this standard, a finding of "inherent" likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. (4a) Application of this "inherent prejudice" test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information.

(3b) But a finding that the information was "harmless" by appellate standards, and thus not "inherently" biasing, does not end the inquiry. Ultimately, the test for determining whether juror misconduct likely resulted in actual bias is "different from, and indeed less tolerant than," normal harmless error analysis, for if it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict. (*People* v. *Marshall*, *supra*, 50 Cal.3d at p. 951.) Thus, even if the extraneous information was not so prejudicial, in and of itself, as to cause "inherent" bias under the first test, the totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose. (4b) Under this second, or "circumstantial," test, the trial record is not a dispositive consideration, but neither is it irrelevant. All pertinent portions of the entire record, including the trial record, must be considered. "The presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, *upon examining the entire record*, that there is no substantial likelihood that the complaining party suffered actual harm." (*People* v. *Hardy* (1992) 2 Cal.4th 86, 174 [5 Cal.Rptr.2d 796, 825 P.2d 781], italics added.)

In an extraneous-information case, the "entire record" logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant. For example, the stronger the evidence, the less likely it is that the extraneous information itself influenced the verdict. An example is provided in *Hasson* v. *Ford Motor Co.*, *supra*, 32 Cal.3d at page 417, where we found the presumption of prejudice had been rebutted, in part because "[t]here was overwhelming proof" in support of the verdict.

(3c) We emphasize that before a unanimous verdict is set aside, the likelihood of bias under either test must be *substantial*. As indicated in the high court decisions discussed above, the criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. The jury system is fundamentally human, which is both a strength and a weakness. (*People* v. *Marshall*, *supra*, 50 Cal.3d at p. 950.) Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic.

If the court concludes it is substantially likely the outside information affected the verdict, or that the juror was *actually biased*, the verdict must be

set aside. If not, "society's interest in the administration of criminal justice" (*Rushen* v. *Spain*, *supra*, 464 U.S. at p. 119 [78 L.Ed.2d at pp. 273-274]) must be vindicated, and the judgment preserved. It is not enough that the juror was "placed in a potentially compromising situation," for then "few trials would be constitutionally acceptable." (*Smith* v. *Phillips*, *supra*, 455 U.S. at p. 217 [71 L.Ed.2d at p. 86].)

2. *The Law Applied to This Case*

(5) In finding penalty phase prejudice, the trial court analogized the misconduct and resultant extraneous information to error under *Caldwell* v. *Mississippi*, *supra*, 472 U.S. 320. For the reasons stated in *Romano* v. *Oklahoma*, *supra*, 512 U.S. __ [129 L.Ed.2d 1], this is incorrect, at least without considering the instructions the jury was given and other relevant information from the trial. (In fairness to the trial court, we note that *Romano* long postdates its decision.)

(6) The court also erred in finding guilt phase prejudice. As discussed in part II, the court found that the extraneous information was inherently prejudicial in and of itself without reference to the rest of the record. It stated the evidence of guilt (as well as that supporting the penalty determination) was "overwhelming," but felt legally precluded from considering this evidence. This is incorrect. To be sure, once actual bias is found, the strength of the evidence is irrelevant; the verdict must be set aside. But such evidence is relevant in determining bias in the first place. Contrary to the dispositive finding of the court below, if the evidence was truly overwhelming, the extraneous information cannot be considered "inherently" prejudicial. This is especially true since evidence of most of the Santa Cruz County *crimes* was presented to the jury. All the juror learned out of court was the verdict of the first jury.[2]

(7) We also find that the surrounding circumstances do not necessarily reveal a substantial likelihood the juror actually was impermissibly influenced by the outside information. The trial court did not make any credibility-based finding that this specific juror was biased, only that the information would have improperly influenced *any* juror. Without minimizing the seriousness of the misconduct here, and "'without detracting from the fundamental importance'" of the rights at stake (*Rushen* v. *Spain*, *supra*, 464

[2]The fact the trial court barred evidence of the prior verdict as substantially more prejudicial than probative, although relevant, is not itself dispositive. A court's determination during trial that certain evidence is more prejudicial than probative, and therefore should not be admitted, is very different from a determination after trial that the jury's acquisition of that evidence was prejudicial in light of the entire record. (See *People* v. *Holloway*, *supra*, 50 Cal.3d at p. 1112.)

U.S. at pp. 117-118 [78 L.Ed.2d at p. 273]), on the basis of the habeas corpus record alone, we do not find a substantial likelihood the juror was biased or that the extraneous information impermissibly influenced her to the defendant's detriment.

During a long and highly publicized trial, the court and parties attempted to hide from the jury the verdict in the previous trial (although not evidence of most of the other crimes themselves). Despite these efforts, one juror learned the truth. Although unfortunate, this is hardly shocking, and does not itself show bias. Just as there is "scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge" (*Rushen* v. *Spain*, *supra*, 464 U.S. at p. 118 [78 L.Ed.2d at p. 273]), so too it is virtually inevitable that in a trial such as this some secrets cannot be kept. "The safeguards of juror impartiality . . . are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." (*Smith* v. *Phillips*, *supra*, 455 U.S. at p. 217 [71 L.Ed.2d at p. 86].)

The juror also failed to report what she had learned, as she should have. But to the extent this was misconduct, it was also *passive*. Having learned what she should not, she chose—improperly to be sure—to keep it to herself. But this alone does not show bias. Many jurors, in the middle of a long and notorious trial, might, for many reasons unrelated to bias, be reluctant to go forward and actively inject themselves into the proceedings. For example, a juror might not attach the same importance to a particular piece of information as do the parties.

The juror also told nonjurors both what she knew and that she knew it was forbidden, and later, after the verdict, denied the misconduct. But it does not follow that she thereby failed to base her verdict solely on the evidence. Telling nonjurors what she knew could not itself have prejudiced defendant. Learning the secret during the long and publicized trial (and then not reporting it) is one thing. Actually *using* the forbidden information—rather than basing the verdict on the evidence—is quite different.

The juror did not suggest that she would consider the extraneous information in reaching her verdict, or that the verdict would be based on anything other than what the trial court characterized as the "overwhelming" evidence. Moreover, the juror did not discuss the defendant's guilt or innocence, and said nothing suggesting she had prejudged the case. Her statement that she was not supposed to know the information she had obtained, although revealing a consciousness of guilt in one sense, also showed that she was aware the knowledge was not supposed to influence her verdict. It

does not indicate that she did what she knew was not allowed. Similarly, the fact the juror covered up *after* the verdict when she was challenged in order to protect herself, although certainly improper, does not show bias *during the trial, deliberations, and verdict.*

We also note the lack of evidence that the juror told any fellow jurors, as distinct from *nonjurors*, what she had learned. Carpenter argues that because prejudice is presumed, we must assume she did tell the other jurors absent affirmative evidence that she did not. That is incorrect. Although prejudice is presumed once misconduct has been established, the initial burden is on defendant to prove the misconduct. (*People* v. *Marshall*, *supra*, 50 Cal.3d at p. 949.) We will not presume greater misconduct than the evidence shows. On this record, we must assume the misconduct extended to learning the information and revealing it to nonjurors, but not to revealing it to other jurors.

Carpenter argues this does not matter because even one improperly influenced juror is enough to overturn the verdict. This is correct once bias is established, but the exact nature of the misconduct is highly relevant to the initial determination of bias, which is based on all the surrounding circumstances. Indeed, in *In re Stankewitz* (1985) 40 Cal.3d 391, 399-400 [220 Cal.Rptr. 382, 708 P.2d 1260], we relied heavily on the fact a juror told others what he (erroneously) thought he knew in finding prejudicial misconduct. The fact the juror here did not reveal her knowledge to the rest of the jury is not alone dispositive, but it is also not irrelevant. Rather, it is probative in two important respects. First, it tends to negate the inference the juror was biased; a biased juror would likely have told other jurors what she had learned. Second, it tends to show the juror intended the forbidden information *not* to influence the verdict.

(8) The fact that the respondent below did not present affirmative evidence showing there was no prejudice also is not dispositive. The presumption of prejudice may be rebutted by an affirmative evidentiary showing "*or* by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct." (*Hasson* v. *Ford Motor Co.*, *supra*, 32 Cal.3d at p. 417, italics added; see also *People* v. *Hardy*, *supra*, 2 Cal.4th at p. 176 [the presumption of prejudice was rebutted "by the evidence" of the trial itself].) As discussed in *People* v. *Holloway*, *supra*, 50 Cal.3d at pages 1108-1109, the presumption of prejudice merely excuses the defendant from affirmatively proving prejudice when that cannot be done. The presumption prevails " 'unless the contrary appears.' " (*Id.* at p. 1108.) If a juror applying for employment with the office of one of the attorneys in a case does not

compel a finding of bias, as in *Smith* v. *Phillips*, *supra*, 455 U.S. 209, so too the evidence of the habeas corpus evidentiary hearing of this case does not itself compel a finding of bias.

Our recent trio of cases is distinguishable. We found the misconduct harmless in *People* v. *Marshall*, *supra*, 50 Cal.3d 907. In *In re Hitchings*, *supra*, 6 Cal.4th 97, the juror had concealed information during jury selection, which did not occur here. We also found a reasonable probability that the juror had "prejudged the case." (*Id.* at p. 121.) There was no evidence of prejudging in this case. *People* v. *Holloway*, *supra*, 50 Cal.3d 1098, is factually more similar, but also distinguishable. There, evidence of the other crimes was not presented at all, and the extrinsic information was particularly prejudicial. As we noted there, the outcome might have been different had the information "been less prejudicial." (*Id.* at p. 1112.) Here, a review of the entire record may show the extrinsic information was not prejudicial.

IV. DISPOSITION

(9) We thus conclude the trial court erred in its finding of prejudice. We must now decide the proper disposition.

As discussed above, in determining prejudice, the entire record must be consulted. The trial court felt precluded from doing this. We could remand the matter to the court to make a new ruling. But, although determinations *during trial* whether a juror is biased and should be excused are entitled to deferential treatment by a reviewing court (*People* v. *McPeters* (1992) 2 Cal.4th 1148, 1175 [9 Cal.Rptr.2d 834, 832 P.2d 146]), as are credibility-based factual determinations by the trial court (*In re Hitchings*, *supra*, 6 Cal.4th at p. 109), neither of these circumstances suggests a remand here. The trial court did resolve the factual conflict in Carpenter's *favor*, which we fully accept. As we have seen, however, those factual findings do not themselves compel a finding of prejudice. Moreover, *posttrial* prejudice is a mixed question of law and fact ultimately determined by the "reviewing court." (*People* v. *Hardy*, *supra*, 2 Cal.4th at p. 174; see, e.g., *People* v. *Holloway*, *supra*, 50 Cal.3d 1098.) Because there is now a full factual record with all conflicts in the evidence resolved and with the relevant historical facts found, little would be gained by a remand. At this point, the question is for our independent determination.

On the other hand, we have not yet fully reviewed the *entire* record. To be sure, we have carefully considered the *habeas corpus* record, and have determined that it alone does not entitle Carpenter to relief. But the record of the *trial* is different. The record in the automatic appeal promises to be

massive but has not yet been certified. In his habeas corpus petition, Carpenter requested the superior court to judicially notice its records in the underlying trial, which it granted, at least impliedly. (Evid. Code, § 452, subd. (d).) On appeal, the Attorney General asks us to judicially notice those records. We grant that request (Evid. Code, § 459, subd. (a)), and have considered—and referred to in this opinion—various noncontroversial facts regarding the trial. But, although judicial notice properly gives us a general idea of what the trial was about, we find it inadequate to the task before us in making a final determination of prejudice.

The trial court stated the evidence in support of the verdicts was "overwhelming," but also cited the role the Santa Cruz crimes played in the trial. Moreover, as suggested, for example, in *Romano* v. *Oklahoma*, *supra*, 512 U.S. at page __ [129 L.Ed.2d at pages 13-14], the precise jury instructions may be pertinent. The record may be relevant in other ways. We cannot now effectively examine the appellate record to confidently review these matters and decide the question of prejudice either way. Because of this, it seems prudent not to make a definitive determination of prejudice at this time, but to reserve it until the complete appellate record is before us.

To resolve this conundrum—which potentially exists in any appeal from a grant of habeas corpus relief such as this—we will reverse the trial court's granting of relief, and provisionally deny the petition at this time. But the denial is without prejudice to Carpenter filing a new petition in this court raising the issue in a manner consistent with this opinion, and based upon the combined records of the habeas corpus proceeding and the underlying trial. Any new petition, which may or may not contain additional claims for relief, would be filed in the same manner, and be subject to the same rules, as any other petition in a death penalty case. We will then consider any such petition after the appellate record has been certified.

Accordingly, the judgment of the superior court granting the petition for writ of habeas corpus is reversed, and the petition is denied without prejudice to Carpenter's filing a new petition in this court in a manner consistent with this opinion.

Baxter, J., George, J., and Werdegar, J., concurred.

MOSK, J.—I dissent.

This is the easy case that makes bad law. In their efforts to find undisputed and serious juror misconduct harmless, the majority conduct an analysis that is specious and fabricate a disposition that is wrong. I refuse to follow.

I

In the Santa Cruz Superior Court, the People accused David Joseph Carpenter of certain offenses committed in that county in the spring of 1981. Specifically, they charged him in five counts with: (1) the murder of Ellen Marie Hansen, with allegations, for death eligibility, that he acted under the special circumstances of felony-murder rape, lying in wait, and multiple murder; (2) the attempted rape of Hansen; (3) the attempted murder of Steven Russell Haertle, with allegations, for enhancement of sentence, that he personally used a firearm and intentionally inflicted great bodily injury; (4) the murder of Heather Scaggs, with allegations that he acted under the special circumstances of felony-murder rape and multiple murder; and (5) the rape of Scaggs. Carpenter pleaded not guilty to the charges and denied the allegations.

After change of venue to Los Angeles County because of pretrial publicity, the superior court called the cause to trial before a jury. After the guilt phase, the jury returned verdicts of guilty as to each of the charges, fixing each of the murders at the first degree, and also returned findings of true as to each of the allegations. After the penalty phase, it returned a verdict of death for each of the murders.

The superior court rendered judgment accordingly. For each of the murders, it imposed a sentence of death. For the related offenses, it suspended imposition of sentence. Our clerk then docketed an automatic appeal.

Subsequently, in San Diego Superior Court, after change of venue from Marin County because of pretrial publicity, the People accused Carpenter of certain offenses committed in the latter county in the fall of 1980. Specifically, they charged him in eight counts with: (1) the murder of Cynthia Toshiko Moreland, with an allegation that he personally used a firearm; (2) the murder of Richard Edward Stowers, with an allegation that he personally used a firearm; (3) the murder of Anne Evelyn Alderson, with allegations that he acted under the special circumstance of felony-murder rape and that he personally used a firearm; (4) the rape of Alderson, with an allegation that he personally used a firearm; (5) the murder of Diane Marie O'Connell, with allegations that he acted under the special circumstance of felony-murder rape and that he personally used a firearm; (6) the attempted rape of O'Connell, with an allegation that he personally used a firearm; (7) the murder of Shauna Catherine May, with allegations that he acted under the special circumstance of felony-murder rape and that he personally used a firearm; and (8) the rape of May, with an allegation that he personally used a firearm; there was also an allegation, separate and independent from any

individual count, that he committed the five charged murders under the special circumstance of multiple murder. Carpenter pleaded not guilty to the charges and denied the allegations.

Prior to trial, the superior court, presided over by Judge Herbert B. Hoffman, ruled on the admissibility of evidence of the Santa Cruz "Trailside Murders." It was the theory of both the People and Carpenter that a single individual committed both the Santa Cruz and the Marin "Trailside Murders"—the former claiming, and the latter denying, that that individual was Carpenter. For the guilt phase, Judge Hoffman permitted evidence of the facts underlying all the offenses in question except those against Scaggs, having determined, inter alia, that the latter were substantially more prejudicial than probative under Evidence Code section 352. For the penalty phase, he permitted evidence of the facts underlying all the offenses without exception. For both phases, however, he barred evidence of Carpenter's convictions and death sentences as substantially more prejudicial than probative.

During jury selection, Judge Hoffman examined numerous prospective jurors along with counsel. Throughout, he continually and specifically admonished them, in accordance with Penal Code section 1122, to the effect that "it [was] their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause [was] finally submitted to them." He also continually and specifically admonished them to avoid publicity relating to the case. Lastly, he admonished them to immediately advise any person who might attempt to discuss the case with them that they could not do so, and to immediately report the matter if such person should persist.

Included among the prospective jurors were two women who each came forward to disclose that she had read a newspaper article reporting that Carpenter had been convicted of the Santa Cruz "Trailside Murders" and had been sentenced to death therefor. The People immediately challenged both for cause: "We just can't leave on people who have read that article. It would poison this whole thing . . . . [W]e just can't infest [*sic*] this case with that kind of error." "I have no doubt in my mind that . . . this case would be reversed" if Carpenter suffered an adverse judgment. Judge Hoffman excused the two women. He later informed apparently all the other prospective jurors of his action.

Also included among the prospective jurors was Barbara Durham. On voir dire, Durham stated that she had not heard of the "Trailside Murders." She was subsequently chosen as one of the 12 jurors. Together with the other 11,

she evidently swore, in conformity with the oath prescribed by statute, that she would "well and truly try" the cause and "a true verdict render according to the evidence." (Code Civ. Proc., former § 604 [enacted 1872, repealed Stats. 1988, ch. 1245, § 7, p. 4155]; accord, *id.*, § 232, subd. (b).)

During the guilt phase, evidence of the facts underlying the Santa Cruz "Trailside Murders," except the Scaggs offenses, was introduced, and turned out to play a large role. Evidence of the resulting convictions and death sentences was not presented and hence did not figure. Throughout, Judge Hoffman continually and specifically gave the jury admonitions that he had given previously, viz., not to discuss the case or form or express any opinion thereon, and to avoid related publicity.

With Juror Durham as foreperson, the jury returned verdicts of guilty as to all the charges, fixing each of the murders at the first degree, and also returned findings of true as to all the allegations.

During the penalty phase, too, evidence of the facts underlying the Santa Cruz "Trailside Murders," including the Scaggs offenses, was introduced, and turned out to play a large role. Again, evidence of the resulting convictions and death sentences was not presented and hence did not figure. Throughout, Judge Hoffman continually and specifically gave the jury admonitions that he had given previously, viz., not to discuss the case or form or express any opinion thereon, and to avoid related publicity.

With Juror Durham as foreperson, the jury returned a verdict of death for each of the murders.

Judge Hoffman rendered judgment accordingly. For each of the five murders, he imposed a sentence of death. For the other offenses, he imposed a sentence of imprisonment for a total term of 22 years, which he stayed temporarily pending execution of the sentence of death and permanently thereafter. Our clerk then docketed an automatic appeal.

II

Carpenter filed a petition for writ of habeas corpus in the San Diego Superior Court challenging the judgment in the Marin "Trailside Murder" case shortly after its rendition. At the threshold, he made allegations that the superior court had subject matter jurisdiction over the habeas corpus proceeding challenging the judgment, notwithstanding the pendency in this court of an automatic appeal therefrom. In its core, he made allegations that Juror Durham had committed prejudicial misconduct that did not appear of

record—specifically and fundamentally, that she had received information outside of court relating to the then-pending Marin "Trailside Murder" case, viz., his Santa Cruz "Trailside Murder" convictions and death sentences; and that she had discussed *that* case and *those* convictions and death sentences with nonjurors. In support, he incorporated various declarations referring to "Mr. A" and a "female friend" as percipient witnesses. He requested the superior court to take judicial notice of its own records relating to the Marin "Trailside Murder" case pursuant to Evidence Code section 452, subdivision (d). Judge Hoffman, who had presided over the trial, was assigned the matter. He subsequently granted the request for judicial notice, impliedly if not expressly.

Judge Hoffman ordered the Director of Corrections to show cause why the relief Carpenter sought should not be granted.

The Director of Corrections filed a return. He denied that Carpenter was entitled to relief. Specifically, he alleged that Judge Hoffman lacked subject matter jurisdiction over the habeas corpus proceeding challenging the judgment because of the pendency in this court of an automatic appeal therefrom.[1] He also alleged that there had been no misconduct by Juror Durham, prejudicial or otherwise. In support, he incorporated declarations by Juror Durham and her husband Ronald Durham. His counsel went so far as to belittle Carpenter's allegations about Juror Durham as without support.

Carpenter filed a traverse. He realleged the facts in his petition as to both subject matter jurisdiction and prejudicial juror misconduct. In addition, he denied the contrary allegations that the Director of Corrections had made in his return on each of these two points. He also alleged new facts as to the latter. In support, he incorporated declarations by Michael Lustig, who was "Mr. A," and Donna Duran, who was his "female friend."

The Director of Corrections filed a memorandum of points and authorities in reply. He continued to dispute subject matter jurisdiction, but not prejudicial juror misconduct. It had by then been learned that, before the filing of the return, his counsel had obtained evidence supporting Carpenter's allegations about Juror Durham, and had attempted to prevent that evidence from coming to light.[2] Judge Hoffman would later express his "dismay" at that conduct.

[1]This in spite of the fact that it had been settled since *France* v. *Superior Court* (1927) 201 Cal. 122 [255 P 815, 52 A.L.R. 869], that what is now section 10 of article VI of the California Constitution grants such jurisdiction *concurrently* to the superior court, the Court of Appeal, and this court. See footnote 2, *post*.

[2]The Director of Corrections' allegations about Judge Hoffman's lack of subject matter jurisdiction should perhaps be considered in light of this fact. See footnote 1, *ante*.

Judge Hoffman ruled, inter alia, that he did in fact have subject matter jurisdiction over the habeas corpus proceeding challenging the judgment, "relating" as it does "to matters outside the trial record," notwithstanding the pendency in this court of an automatic appeal therefrom. Noting, inter alia, that he was "familiar" with Juror Durham, he determined that his exercise of subject matter jurisdiction was appropriate in view of "the interests of justice, judicial economy, and the avoidance of potentially prejudicial delay to both parties."[3]

Thereupon, Judge Hoffman ordered an evidentiary hearing on juror misconduct. He imposed on Carpenter, as the petitioner, the burden of proving the facts underlying his claim by a preponderance of the evidence. To carry his burden, Carpenter presented extensive evidence, mainly through Lustig and Duran. For his part, the Director of Corrections presented extensive evidence as well, mainly through Juror Durham and her husband Ronald.

Judge Hoffman characterized the evidentiary hearing that transpired as a "classic credibility contest" between Lustig and Duran, on one side, and Juror Durham and her husband Ronald, on the other. He proceeded to resolve the contest in favor of the former and against the latter. Lustig's testimony was "credible . . . in almost all respects." Duran's was credible in all respects without exception. By contrast, the testimony of Ronald was doubtful. That of Juror Durham herself was more doubtful still; indeed, in its general denial of misconduct, it was perjurious.

From all the evidence, Judge Hoffman determined, in substance, that Juror Durham had in fact committed misconduct by receiving information outside of court relating to the then pending Marin "Trailside Murder" case, viz., Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences. By March 26, 1988—a date in the middle of the guilt phase that will show itself to be critical in due course—Juror Durham had received the forbidden information from newspaper accounts, either directly—she was an avid newspaper reader who had bristled under Judge Hoffman's admonition to avoid publicity—or, more likely, through her husband Ronald. Until at least March 26, 1988, the couple received delivery of a newspaper at their home. They had stated in their declarations, but falsely, that they had canceled their subscription, in order to avoid publicity, around the opening of the guilt phase: rather, they ordered cancellation much later—on, or as of, March 26, 1988. At all times relevant here, they were experiencing drinking problems and marital troubles. Juror Durham, of course, sat on Carpenter's trial for the

[3]Subsequently, the Director of Corrections filed a petition for writ of mandate and/or prohibition in this court challenging the superior court's ruling on subject matter jurisdiction, but met with summary denial.

Marin "Trailside Murders." Ronald openly criticized the trial, evidently from its commencement, as a waste of time and money, having learned that Carpenter had already been convicted and sentenced to death for the Santa Cruz "Trailside Murders." The "situation" was "very explosive," presenting an "opportunity for a verbal battle between husband and wife while parties have been drinking." "[O]n many occasions he apparently told her when she would come home from this trial, . . . 'I know so much more about this case than you do.' [¶] . . . I don't know what would provoke that kind of response unless Mrs. Durham is somehow talking about aspects of the case." He had the "opportunity . . . to let his wife know in no uncertain terms that you're just wasting your time on this trial because Mr. Carpenter has already got the death sentence and he's been convicted of similar crimes."

Judge Hoffman also determined, in substance, that Juror Durham had in fact committed misconduct by discussing the then pending Marin "Trailside Murder" case and also Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences with nonjurors, including Lustig and Duran. On March 26, 1988—the date referred to above—Lustig and Duran were taking dinner, along with others, at the Lakeland Resort in the small community of Julian in San Diego County; Lustig noticed Juror Durham and her husband Ronald nearby, and invited them to his table; Lustig and Duran were merely social acquaintances of the Durhams and not intimate friends; once at Lustig's table, Juror Durham initiated a five- or ten-minute conversation about the Marin "Trailside Murder" case; in its course, she made a statement, as if boastfully, to the effect that "We"—meaning the jury—"are not supposed to know this, but Carpenter has already been convicted and sentenced to death for the Santa Cruz 'Trailside Murders.'" During trial, Juror Durham had shown herself to be an "outspoken person," indeed a "very outspoken" person, and to have "no hesitancy talking about her marital problems" even "with a virtual stranger . . . . And . . . that's something similar to the fact that she would share with a stranger her confidential information about this case." "[S]he wanted to be the center of attention that night, and that kind of disclosure placed her in the center of attention with the Lustig[]" party. She admitted she had discussed the Marin "Trailside Murder" case with Lustig and Duran on the date in question. But she denied making the statement revealing that she knew the forbidden information and knew it was forbidden. She perjured herself thereby.

Judge Hoffman then ordered a hearing on prejudice. At the threshold, he determined—correctly—that juror misconduct was not reversible per se, but raised a presumption of prejudice, which the Director of Corrections had to rebut, if he could, or lose the challenged judgment. He followed the Court of Appeal's decision in *People* v. *Martinez* (1978) 82 Cal.App.3d 1 [147

Cal.Rptr. 208] (hereafter sometimes *Martinez*), which looked to whether the extrajudicial information underlying the misconduct had adversely affected the impartiality of at least one juror, had lightened the prosecution's burden of proof, or had contradicted the defendant's defense.[4] This court's decisions in *People* v. *Marshall* (1990) 50 Cal.3d 907 [269 Cal.Rptr. 269, 790 P.2d 676] (hereafter sometimes *Marshall*), *People* v. *Holloway* (1990) 50 Cal.3d 1098 [269 Cal.Rptr. 530, 790 P.2d 1327] (hereafter sometimes *Holloway*), and *In re Hitchings* (1993) 6 Cal.4th 97 [24 Cal.Rptr.2d 74, 860 P.2d 466] (hereafter sometimes *Hitchings*), had not yet been handed down. *Marshall*, *Holloway*, and *Hitchings* superseded *Martinez*, replacing its three-pronged standard with their own "substantial likelihood" test, which asks whether there is a substantial likelihood, objectively assessed, that the extrajudicial information underlying the misconduct impermissibly influenced at least one juror.[5]

After the hearing on prejudice, at which the Director of Corrections did not seek to introduce any evidence, Judge Hoffman determined that Juror Durham's misconduct was indeed prejudicial. He found, inter alia, that her impartiality had been adversely affected—that is to say, that she had not been impartial; that the People's burden of proof had been lightened; and that Carpenter's defense had been contradicted. Expressly or impliedly, he relied on, among other things, the nature of the information she had received outside of court relating to Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences; the circumstances surrounding its receipt; her statement to the effect that "We are not supposed to know this, but Carpenter has already been convicted and sentenced to death for the Santa

[4]See *People* v. *Martinez*, *supra*, 82 Cal.App.3d at page 22: "[I]t is clear that the usual 'harmless error' tests for determining the prejudicial effect of an error (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824, 827-828, 24 A.L.R.3d 1065]; *People* v. *Watson* [(1956)] 46 Cal.2d 818, 836 [299 P.2d 243]) are inapplicable. Convincing evidence of guilt does not deprive a defendant of the right to a fair trial [citation] since a fair trial includes among other things the right to an unbiased jury, the presumption of innocence, and the right to assert a defense after the prosecution has presented its case in chief. Thus, whether a defendant has been injured by jury misconduct in receiving evidence outside of court necessarily depends upon whether the jury's impartiality has been adversely affected, whether the prosecution's burden of proof has been lightened and whether any asserted defense has been contradicted. If the answer to any of these questions is in the affirmative, the defendant has been prejudiced and the conviction must be reversed."

[5]See *People* v. *Marshall*, *supra*, 50 Cal.3d at page 950: "A judgment adverse to a defendant in a criminal case must be reversed or vacated 'whenever . . . the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury.' " (Accord, *In re Hitchings*, *supra*, 6 Cal.4th at p. 118; *People* v. *Holloway*, *supra*, 50 Cal.3d at p. 1109.)

See *People* v. *Marshall*, *supra*, 50 Cal.3d at page 951: " 'The ultimate issue of influence on the juror is resolved by reference to the substantial likelihood test, an objective standard.' " (Accord, *People* v. *Holloway*, *supra*, 50 Cal.3d at p. 1109.)

Cruz 'Trailside Murders' "—which revealed both knowledge of the forbidden information and knowledge of the fact that it was forbidden; her immediate and deliberate attempt to cover up her misconduct by canceling her newspaper subscription, and her immediate and manifest consciousness of guilt; her observed attitudes and actions during the Marin "Trailside Murder" trial, as seen from the perspective of the evidentiary hearing; her false declaration about the newspaper-subscription cancellation; her demeanor at the evidentiary hearing; and her perjury on the witness stand during its course.

Judge Hoffman's reasoning in support of his ruling on prejudice is crucial. It demands to be set out at length.

Judge Hoffman provided the following introduction.

". . . In this case, . . . the Court found that Barbara Durham, the foreperson of the Carpenter jury, had committed juror misconduct and that she had violated the Court's admonition not to read about or discuss the David Carpenter case. And as a result of her misconduct, the Court finds that she learned that the defendant had been convicted of other similar crimes and that a death penalty sentence had been imposed on the defendant in the other case.

"As a result of this misconduct—a presumption of prejudice arises from any juror misconduct, which may be rebutted by an affirmative evidentiary showing that the prejudice does not exist or by a reviewing court's examination of the entire record to determine where there is a reasonable possibility of actual harm to the complaining party resulting from the misconduct which the Court finds to mean is that could have this affected any juror's impartiality, and the Court should review the entire record to make that determination.

"And unless the prosecution rebuts this presumption of prejudice by proof that no prejudice resulted, the cases hold that the defendant is entitled to a new trial."

Earlier in the hearing, Judge Hoffman had asked, "What do you look at the entire record for . . . ?" Straightway, he answered, "It's whether or not the juror—as I read it, it's whether or not the juror has been biased against the defendant or whether or not the juror's impartiality has been compromised because of misconduct."

Judge Hoffman went on: "I think really the question is, you know, does—regardless—and I think this is a correct statement of the law, that

regardless of the strength of the prosecution's case, every defendant is entitled to a verdict by 12 fair and impartial jurors, that's what this whole system is about, and not 11, not 10 or 9, but 12.

"And if one of those jurors, regardless of the strength of the prosecution's case, which in this case was as strong as any case I've ever seen as a judge or prosecuted when I was a prosecutor, it was that strong, but if the juror's impartiality is compromised, the defendant has not received what the Constitution offers to him and what we all trust that every defendant will get, a fair jury trial before 12 impartial jurors.

"And the question really is, regardless of the strength of the case, was Mrs. Durham's impartiality compromised? And you have to—I think you have to look at that in the context of the case itself."

With regard to Juror Durham's perjurious denial at the evidentiary hearing of her receipt of extrajudicial information about Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences, Judge Hoffman posed the rhetorical question: "And then you get to the—then you get to the hearing and the confrontation, she denies it. . . . Now what inferences can you draw from the fact that when she's confronted, she denies it, as to her impartiality[?]"

In making his ruling on prejudice, Judge Hoffman proceeded thus: "Whether a defendant has been injured by jury misconduct in receiving evidence outside of court as the case of *People* v. *Martinez* has held is a three-prong test. The first part of the test is whether the juror's impartiality has been adversely affected; second, whether the prosecution's burden of proof has been lightened; and third, whether any asserted defense by the defendant has been contradicted by the misconduct.

"The *Martinez* court has held that if the answer to any of these questions is in the affirmative, that the defendant has been prejudiced and the conviction must be reversed. Both the prosecution and the defendant in this case agree that *People* vs. *Martinez* is the proper test for the Court to determine in evaluating the misconduct of Barbara Durham.

"Since jury misconduct is not per se reversible, if the Court's review of the entire record demonstrates that the defendant has suffered no prejudice in any of the three areas described from the misconduct, then a reversal and new trial is not compelled." (Italics added in place of full capitalization in original.)

Judge Hoffman first analyzed the question of prejudice as to the issue of penalty.

"The case of *Caldwell* vs. *Mississippi* [(1985) 472 U.S. 320 (86 L.Ed.2d 231, 105 S.Ct. 2633)], a recent Supreme Court [of the] United States case, has held that it's constitutionally impermissible to rest a death sentence on a determination made by a juror who has been led to believe that the responsibility for the defendant's death rests elsewhere [than] in that juror's determination." (Italics added in place of full capitalization in original.)

"Now, in this case the Court found that Mrs. Durham had knowledge from her husband that Mr. Carpenter, because of a conviction in similar crimes, had been given the death sentence by another jury. In this Court's judgment, without any question, this information would serve to minimize her sense of responsibility in making the difficult and uncomfortable penalty determination.

"She could very likely have concluded that since a person can be executed only once, the second death penalty sentence, the one that she was contemplating, was a mere formality, and the real possibility for the defendant's—responsibility for the defendant's death sentence belonged to the first jury and not herself.

"This Court finds as a result of Mrs. Durham's knowledge with respect to Mr. Carpenter's prior death sentence that the prosecution is unable to rebut the presumption of prejudice that arises out of the facts in this case and that the very real possibility of actual harm to the defendant as a result of Mrs. Durham's misconduct is completely apparent in the context of the penalty phase deliberations.

"And so the Court finds, in applying the *Martinez* test to the penalty phase in this case, the Court finds that Mrs. Durham would have her impartiality compromised against the defendant by knowing that another jury of 12 has concluded that he is a person worthy of the death sentence and that would affect her decision.

"The prosecution's burden of proof in this case in the penalty phase," to the extent that such burden existed, "has been lightened by the fact that Mrs. Durham knew that Mr. Carpenter had been sentenced to the death penalty.

"There is simply no way that she could have given the—no matter what she felt about Mr. Carpenter, there's no way that she could have given that the same kind of consideration knowing on the one hand that the defendant already had been sentenced to death by another jury. So I think the prosecution's burden to that extent was lightened.

"And it also certainly affected her ability to judge the defense that Mr. Carpenter was presenting with respect to an offer of life imprisonment.

Basically, I think she would have to say, 'What difference does that make because he's going to die anyhow, no matter what they tell us about it?' So she couldn't have treated it in the same light. So I really don't think there's any question, whatsoever.

"[The prosecution] . . . failed . . . to rebut the presumption of prejudice with respect to the penalty phase." (Italics added in place of full capitalization in original.)

Judge Hoffman then analyzed the question of prejudice as to the issue of guilt.

"Now, in the guilt phase of this case the Court finds that the evidence of guilt is overwhelming. And . . . I believe that without a shadow of a doubt that Mr. Carpenter was guilty of the charges that were presented against him without any question.

"Now, the cases have never articulated the standard to be applied by an appellate court in determining whether the presumption of prejudice has been rebutted, but I find . . . that it's clear that the usual harmless error tests for determining the prejudicial effect of an error is inapplicable, and that's *People* vs. *Watson* [(1956) 46 Cal.2d 818 (299 P.2d 243)] and *Chapman* vs. *California* [(1967) 386 U.S. 18 (17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065)].

"Convincing evidence of guilt does not deprive the defendant of a right to a fair trial since a fair trial includes, among other things, the right to an unbiased jury, the presumption of innocence and the right to assert a defense after the prosecution has presented its case-in-chief." (Italics added in place of full capitalization in original.)

"Now, with respect to the guilt phase, to rebut the presumption of prejudice the People must show that Mrs. Durham remained impartial despite her knowledge of appellant's other convictions for similar crimes and death sentence, and also, as the *Martinez* test states, the prosecution's burden of proof was not lightened, and that no assert[ed] defenses had been contradicted. That is a factual situation, and the likelihood of the same verdict despite the misconduct is of no consequence.

"There are cases where a presumption of prejudice has been rebutted. . . .

"Factors which have been considered are whether the extrajudicial information was inherently nonprejudicial, whether the information pertained to

matters unrelated to the pending case, whether the Court had an opportunity to alleviate the potential prejudice with a curative admonition to the jurors.

"In this case the Court cannot find that the misconduct committed by Ms. Durham and the information she received was innocuous or of a trivial nature. I would find that the extrajudicial information that caused her misconduct was inherently prejudicial. It related directly to the pending action. And the Court was unable to give a curative admonition to the jury—to the juror in this case.

"Analyzing the criteria set forth in *Martinez*, the respondent has not made a factual showing sufficient to rebut the presumption of prejudice in this case as to the guilt phase. In this case, the nature of the information was such that the juror's impartiality could not be anything but adversely affected.

"The fact that the juror, first of all, knew that Mr. Carpenter was the kind of person that 12 other people had sentenced—chose to sentence to death, in my judgment, could not but affect her determination of whether or not she could remain a fair and impartial juror as to this case and in evaluating the evidence . . . . So I definitely believe it affects her impartiality.

"As to whether or not the prosecution's burden was lightened in this case, this unique aspect of this case makes the information Mrs. Durham knew highly prejudicial, and that's the fact that it was conceded by the defense and argued by the prosecution that one person committed both the Santa Cruz and the Marin murders.

"And the evidence really supported that theory. Both the defense assumed it and the prosecution argued it. And if the juror in this case, Ms. Durham, believed or understood that 12 other persons had found the petitioner, Mr. Carpenter, guilty of the Santa Cruz murders beyond a reasonable doubt, the prosecutor's job of proving the petitioner guilty beyond a reasonable doubt in the Marin cases would be much easier.

"And . . . I don't see any sense to re-elaborate on that question, the uniqueness of this case. I think the record is clear.

"Of the time involved in the guilt phase of the trial, I would estimate that two-thirds of that time was directed at the evidence of the Santa Cruz . . . incident[s] and the remaining one-third was directed at proving the Marin crimes. That's how important they were. And that's what makes—" (Italics added in place of full capitalization in original.)

"And every pretrial ruling that I made in this case was in an effort in keeping from the jury the fact that there had been a determination, especially

when there was no question in this case that [the] theory on both sides was one murderer is all the murderers, if he's the murderer in [Santa Cruz], he's the murderer in all the Marin cases. If he's not, he's not the murderer in the Marin cases." "And so I felt, to give Mr. Carpenter a fair trial, in pretrial rulings, that that fact could not be made available to the jury or it just sounded the death bell for him. There was no chance after that. And that's why I made the rulings that I did.

"Everything was done in this case by the Court, as I've stated, to keep from the jury the evidence that Mr. Carpenter had been convicted of the Santa Cruz crimes . . . in the guilt phase. And everything was done by this Court in its rulings to keep from the jury in the penalty phase that Mr. Carpenter had been sentenced to death as a result of the Santa Cruz crimes. And despite everything that was done by way of evidentiary rulings and the like, this is exactly the information that Mrs. Durham had.

"As to the third prong of the *Martinez* test, that the petitioner asserts a defense, in this case, that he was not the trailside killer, that was certainly undermined by the knowledge that another jury had found that he was in fact the trailside killer.

"So I can't find that that prong has been rebutted, either. And any one of the three prongs that has not been rebutted would be sufficient enough to give Mr. Carpenter a new trial." (Italics added in place of full capitalization in original.)

For the benefit of the Director of Corrections, Judge Hoffman added: "[T]he Court believes that if—had this jury been completely impartial, that applying the reasonable doubt standard [of *Chapman* v. *California* (1967) 386 U.S. 18, 24 (17 L.Ed.2d 705, 710-711, 87 S.Ct. 824, 24 A.L.R.3d 1065)], I would find that despite the information that Ms. Durham knew, because of the gravity of the crimes themselves, first of all, I would find beyond a reasonable doubt that any jury would have sentenced the defendant to the death penalty based upon the evidence presented and would also find that the evidence was so overwhelming with respect to the defendant's guilt that if the harmless error standard applied in this case, that Mrs. Durham's misconduct, if you could apply the harmless error standard to juror misconduct, I would find that her knowledge would be harmless beyond a reasonable doubt because of the overwhelming nature of the evidence in this case and as well as the overwhelming proof of the gravity of the aggravating circumstances in the penalty phase so completely outweighed and dominated the mitigation factors that the jury would make that result."

Judge Hoffman concluded with the statement that, in ordering a new trial, he did so "regrettably . . . because this [disposition] is not one that is

particularly gratifying to the Court, given all the time and effort that was put in by the other jurors in this case, the clerk, staff, the attorneys, everybody connected with this case. This is an absolute travesty that such a result could happen to such a case. [¶] And I find the fault with the foreperson in this case, Barbara Durham. And . . . a letter is going to be delivered to the Attorney General's office in San Diego as well as to the District Attorney's office for the County of San Diego that will state," among other things, "[t]hat I believe the matter should be reviewed for possible criminal prosecution under Penal Code Section 96," which, inter alia, subjects to fine or imprisonment any juror who "[w]illfully and corruptly permits any communication to be made to him, or receives any . . . information relating to any cause or matter pending before him, except according to the regular course of proceedings." The indicated letter was, in fact, delivered.[6]

Thereupon, Judge Hoffman rendered his judgment and order vacating the challenged judgment. Our clerk then docketed an automatic appeal.

III

It is of course misconduct for a juror to receive information outside of court relating to the pending case. We so held—and not for the first time—in *Holloway*. There, we explained: " 'Jurors in a criminal action are sworn to render a true verdict according to the evidence. They cannot, under the oath which they take, receive impressions from any other source.' " (*People* v. *Holloway*, *supra*, 50 Cal.3d at p. 1108, quoting *People* v. *McCoy* (1886) 71 Cal. 395, 397 [12 P. 272].) Under that oath, prescribed by statute, they swear that they will " 'well and truly try' " the cause and " 'a true verdict render *according . . . to the evidence . . . .*' " (Code Civ. Proc., § 232, subd. (b), italics added; accord, *id.*, former § 604.) A juror's receipt of extrajudicial information about the case "deprives [the parties] of the opportunity to conduct cross-examination, offer evidence in rebuttal, argue the significance of the information to the jury, or request a curative instruction." (*United States* v. *Bagnariol* (9th Cir. 1981) 665 F.2d 877, 884, fn. 3.)

It is also misconduct for a juror to discuss a pending case with nonjurors. We so held—and not for the first time—in *Hitchings*. There, we explained:

[6] The record reflects that the Attorney General responded to Judge Hoffman's letter, as follows: "The Attorney General's office will not review the matter for possible criminal charges against Ms. Durham, but will leave that to the District Attorney. [¶] As the public prosecutor for the county, the District Attorney is the appropriate official to review the matter. Also, the Attorney General represents the People on Carpenter's automatic appeal from the San Diego County death sentence which is now pending before the California Supreme Court, and will represent [the Director of Corrections] on any review of [the] order in the habeas corpus proceeding."
The record is silent, however, as to any response to Judge Hoffman's letter by the San Diego District Attorney.

"Penal Code [section 1122] provides that jurors must not 'converse among themselves *or with anyone else* on any subject connected with the trial . . . .' " (*In re Hitchings*, *supra*, 6 Cal.4th 97, 118, italics added.) "Violation of this duty is serious misconduct." (*Ibid.*)

In this proceeding, Judge Hoffman determined that Juror Durham committed misconduct by receiving information outside of court relating to Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences. Beyond all doubt, he was correct.

Judge Hoffman had rightly imposed on Carpenter, as the petitioner, the burden of proving the facts underlying his claim by a preponderance of the evidence. (E.g., *People* v. *Ledesma* (1987) 43 Cal.3d 171, 243 [233 Cal.Rptr. 404, 729 P.2d 839] (conc. opn. of Grodin, J.).) He carried his burden here. It was undisputed that *if* Juror Durham had received information relating to his Santa Cruz "Trailside Murder" convictions and death sentences, she had received it outside of court. The record establishes that the condition was satisfied. The proof is the words she spoke on March 26, 1988, to the effect that "We are not supposed to know this, but Carpenter has already been convicted and sentenced to death for the Santa Cruz 'Trailside Murders.' " Her remark revealed both knowledge of the forbidden information and knowledge of the fact that it was forbidden. At the evidentiary hearing, she denied her words. But she perjured herself thereby. She must be deemed to have violated her statutory duty to render "a true verdict render *according to the evidence*" (Code Civ. Proc., former § 604, italics added; accord, *id.*, § 232, subd. (b)) by receiving information outside of court (*People* v. *Holloway*, *supra*, 50 Cal.3d at p. 1108). She did not do so innocently or out of ignorance. Certainly, she did not commit a merely "technical" breach. She had taken an oath against such a violation. In addition, she had been admonished in that regard, continually and specifically. To be sure, she may not have knowingly and willfully *obtained* the forbidden information in contravention of the letter of Judge Hoffman's order when she first learned of the facts in question. But, without doubt, she knowingly and willfully *retained* such information against the spirit of his order when she failed to make any disclosure concerning the matter.

Judge Hoffman also determined that Juror Durham committed misconduct by discussing the then pending Marin "Trailside Murder" case with nonjurors. Here too, beyond all doubt, he was correct. Carpenter carried his burden of proof in this regard as well. Juror Durham admitted she had discussed the Marin "Trailside Murder" case with Lustig and Duran on March 26, 1988. In addition, she was impliedly found to have discussed it with her husband Ronald on several occasions. It follows that she violated

the duty imposed by Penal Code section 1122 not to converse about the case with the other jurors or "with anyone else . . . ." She did not do so innocently or out of ignorance. Here too, she did not commit a merely "technical" breach. She had been admonished against such a violation, continually and specifically. She had also been admonished to immediately report any person who might persistently attempt to discuss the case, but had failed to do so. One point bears special emphasis: By revealing to Lustig and Duran, as if boastfully, that she knew that the forbidden information about Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences *was in fact forbidden*, she showed not only a readiness to violate her duty, but also a willingness to flaunt her violation.

Proceeding from juror misconduct to its consequences, we must next consider the question of prejudice. That is because juror misconduct "is not per se reversible . . . ." (*People* v. *Martinez*, *supra*, 82 Cal.App.3d at p. 22.)

"As a general rule, juror misconduct 'raises a presumption of prejudice . . . .' " (*In re Hitchings*, *supra*, 6 Cal.4th at p. 118.) The "general rule" operates for a juror's receipt of information outside of court relating to the pending case (e.g., *People* v. *Holloway*, *supra*, 50 Cal.3d at p. 1108) and also for a juror's discussion of the case with nonjurors (e.g., *In re Hitchings*, *supra*, 6 Cal.4th at p. 119). "When a person violates his oath as a juror, doubt is cast on that person's ability to otherwise perform his duties." (*People* v. *Cooper* (1991) 53 Cal.3d 771, 835-836 [281 Cal.Rptr. 90, 809 P.2d 865].)

As stated, juror misconduct raises a *presumption* of prejudice. That presumption is not conclusive, but is instead rebuttable. (E.g., *In re Hitchings*, *supra*, 6 Cal.4th at p. 118; *People* v. *Holloway*, *supra*, 50 Cal.3d at p. 1108.) The party seeking to salvage the challenged judgment bears the burden. If he does not carry the latter, he loses the former.

The prejudice analysis pertinent to the kind of juror misconduct with which we are concerned is set out in *Marshall*, *Holloway*, and *Hitchings*, which articulate and apply the "substantial likelihood" test: is there a substantial likelihood, objectively assessed, that the extrajudicial information underlying the misconduct impermissibly influenced one or more jurors?

"Such 'prejudice analysis' is different from, and indeed less tolerant than, 'harmless-error analysis' for ordinary error at trial. The reason is as follows. Any deficiency that undermines the integrity of a trial—which requires a proceeding at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury—introduces the taint of fundamental unfairness and calls for reversal without consideration

of actual prejudice. [Citation.] Such a deficiency is threatened by jury misconduct. When the misconduct in question supports a finding that there is a substantial likelihood that at least one juror was impermissibly influenced to the defendant's detriment, we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial." (*People* v. *Marshall*, *supra*, 50 Cal.3d at p. 951; accord, *People* v. *Holloway*, *supra*, 50 Cal.3d at pp. 1109-1110.)

To emphasize: the substantial likelihood of impermissible influence is satisfied if even a single juror is affected, though the rest are not.

Under article I, section 16 of the California Constitution, as we declared in *Holloway*, a criminal defendant has a right "to be tried by 12, not 11, impartial and unprejudiced jurors. 'Because a defendant charged with crime has a right to the unanimous verdict of 12 impartial jurors (*People* v. *Wheeler* (1978) 22 Cal.3d 258, 265-266 [148 Cal.Rptr. 890, 583 P.2d 748]), it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' " (*People* v. *Holloway*, *supra*, 50 Cal.3d at p. 1112.) "A strict rule that one tainted juror compels reversal [or vacation] is necessary in criminal cases because under the California Constitution, the jury must unanimously agree that a defendant is guilty. [Citations.] The vote of one tainted juror obviously renders the required unanimous verdict unreliable." (*Glage* v. *Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 322 [276 Cal.Rptr. 430], fn. omitted.)

Under the United States Constitution, the law is similar.

Pursuant to the Sixth Amendment as applied to the states through the Fourteenth Amendment's due process clause, a criminal defendant in a state trial such as Carpenter's has a right to trial by jury. (*Duncan* v. *Louisiana* (1968) 391 U.S. 145, 147-158 [20 L.Ed.2d 491, 495-501, 88 S.Ct. 1444].)

It is true that, under the Sixth Amendment, the defendant does not have a right to a unanimous verdict (*Apodaca* v. *Oregon* (1972) 406 U.S. 404, 410-412 [32 L.Ed.2d 184, 191-192, 92 S.Ct. 1628] (plur. opn. by White, J.); *Johnson* v. *Louisiana* (1972) 406 U.S. 356, 369-377 [32 L.Ed.2d 152, 163-168, 92 S.Ct. 1620] (conc. opn. of Powell, J.)) from a jury consisting of 12 persons (*Williams* v. *Florida* (1970) 399 U.S. 78, 86-103 [26 L.Ed.2d 446, 452-462, 90 S.Ct. 1893]). It is also true that, under the same amendment, the defendant does not have a right to trial by jury *at all* when the determination goes to issues other than guilt, including penalty. (*Spaziano* v. *Florida* (1984) 468 U.S. 447, 457-465 [82 L.Ed.2d 340, 350-356, 104 S.Ct. 3154].)

Nevertheless, under both the Sixth Amendment and the Fourteenth Amendment's due process clause, the defendant does indeed have a right to an impartial jury on the issue of guilt. (*Ristaino* v. *Ross* (1976) 424 U.S. 589, 595, fn. 6 [47 L.Ed.2d 258, 263-264, 96 S.Ct. 1017]; see *Morgan* v. *Illinois* (1992) 504 U.S. ___, ___-___ [119 L.Ed.2d 492, 500-502, 112 S.Ct. 2222, 2228-2229].) Under the Fourteenth Amendment's due process clause, the defendant also has a right to an impartial jury *on any issue*, including penalty, if in fact he is tried by a jury thereon. (*Morgan* v. *Illinois*, *supra*, 504 U.S. at pp. ___-___ [119 L.Ed.2d at pp. 500-502, 112 S.Ct. at pp. 2228-2229].)

If even one juror is not impartial, that juror's participation renders any guilt determination invalid apparently under the Sixth Amendment and surely under the Fourteenth Amendment's due process clause. (*Irvin* v. *Dowd* (1961) 366 U.S. 717, 722 [6 L.Ed.2d 751, 755-756, 81 S.Ct. 1639].) Such a juror's participation renders any penalty determination invalid under the latter federal constitutional provision. (*Morgan* v. *Illinois*, *supra*, 504 U.S. at pp. ___-___ [119 L.Ed.2d at p. 502, 112 S.Ct. at pp. 2229-2230].) Invalidation is generally required under the Fourteenth Amendment's due process clause because a juror's "verdict must be based upon the evidence developed at the trial. [Citation.] This is true, regardless of the heinousness of the crime charged" or "the apparent guilt" or blameworthiness "of the offender." (*Irvin* v. *Dowd*, *supra*, 366 U.S. at p. 722 [6 L.Ed.2d at p. 755]; accord, *Morgan* v. *Illinois*, *supra*, 504 U.S. at p. ___ [119 L.Ed.2d at pp. 500-501, 112 S.Ct. at p. 2228].)

In this proceeding, Judge Hoffman asked whether Juror Durham's misconduct in receiving information outside of court relating to Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences was prejudicial. He answered in the affirmative. He determined that the misconduct raised a presumption of prejudice. He then determined that, in spite of the Director of Corrections' efforts, the presumption stood unrebutted. He was correct.

To begin with, Judge Hoffman was sound in determining that juror misconduct raises a presumption of prejudice. He could not have done otherwise. That is simply the law.

Further, Judge Hoffman was sound in determining that, in spite of the Director of Corrections' efforts, the presumption stood unrebutted.

In making his determination on prejudice, Judge Hoffman, unsurprisingly, followed *Martinez*, which had already been decided, and not *Marshall*, *Holloway*, and *Hitchings*, which had not. Under *Martinez*, he was required to

ask whether, as a result of the receipt of extrajudicial information, the jury's impartiality had been adversely affected, the prosecution's burden of proof had been lightened, or the defendant's defense had been contradicted. Under *Marshall*, *Holloway*, and *Hitchings*, he would have been required to ask whether, as a result of the receipt of extrajudicial information, there was a substantial likelihood that at least one juror was impermissibly influenced.

By following *Martinez* and not *Marshall*, *Holloway*, and *Hitchings*, Judge Hoffman did not undermine his reasoning or skew his results—at least not to the harm of the Director of Corrections. The scope of *Martinez* is substantially the same as that of *Marshall*, *Holloway*, and *Hitchings*. True, there is a difference in language: the *Martinez* court spoke more specifically and we spoke more generally. But that difference is of no consequence for purposes here. In addition, the standard of *Martinez* is substantially the same as that of *Marshall*, *Holloway*, and *Hitchings*. Here too, there is a difference in language: apparently, the *Martinez* court spoke more in terms of actuality and we spoke more in terms of probability. If anything, this difference may support the proposition that the *Martinez* court set a *higher* threshold for relief than we subsequently did in *Marshall*, *Holloway*, and *Hitchings*. *Marshall*, *Holloway*, and *Hitchings* require injury to the defendant only as a *substantial likelihood*. *Martinez*, by contrast, may be read to require such injury as an *actual fact*.

Judge Hoffman was correct in finding that Juror Durham's impartiality had been "adversely affected," within the meaning of *Martinez*, by her receipt of extrajudicial information about Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences—that is to say, that she had not been impartial. In his own words: "I definitely believe it affects her impartiality."

A finding like Judge Hoffman's on the impartiality of a juror is reviewed under the deferential substantial-evidence standard. (See, e.g., *People* v. *Gordon* (1990) 50 Cal.3d 1223, 1262 [270 Cal.Rptr. 451, 792 P.2d 251]; see also *People* v. *Zapien* (1993) 4 Cal.4th 929, 993-997 [17 Cal.Rptr.2d 122, 846 P.2d 704] [effectively implying as much]; cf. 2 Childress & Davis, Federal Standards of Review (2d ed. 1992) § 12.06, pp. 12-42-12-43 [stating that "the trial court's determination as to jury bias or impartiality" is a "pure fact question[]" and, as such, is "reviewable under the clearly erroneous standard"].) The reason for deference is based, in part, on the fact that a finding on impartiality depends on a finding as to state of mind, and a finding as to state of mind depends in turn on a finding as to "demeanor and credibility," which "are peculiarly within a trial judge's province." (*Wainwright* v. *Witt* (1985) 469 U.S. 412, 428 [83 L.Ed.2d 841, 854, 105 S.Ct.

844], fn. omitted; see, e.g., *People* v. *McPeters* (1992) 2 Cal.4th 1148, 1175 [9 Cal.Rptr.2d 834, 832 P.2d 146] [stating that, generally, the "trial judge is in the best position to assess the state of mind of a juror"].)

Judge Hoffman's finding that Juror Durham's impartiality had been adversely affected—that she had not been impartial—is supported by more than substantial evidence. Such evidence includes: the nature of the information she had received outside of court relating to Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences; the circumstances surrounding its receipt; her statement to the effect that "We are not supposed to know this, but Carpenter has already been convicted and sentenced to death for the Santa Cruz 'Trailside Murders' "—which revealed both knowledge of the forbidden information and knowledge of the fact that it was forbidden; her immediate and deliberate attempt to cover up her misconduct by canceling her newspaper subscription, and her immediate and manifest consciousness of guilt; her observed attitudes and actions during the Maria "Trailside Murder" trial, as seen from the perspective of the evidentiary hearing; her false declaration about the newspaper subscription cancellation; her demeanor at the evidentiary hearing; and her perjury on the witness stand during its course.

Judge Hoffman was also sound in determining that the People's burden of proof had been "lightened," within the meaning of *Martinez*, by Juror Durham's receipt of extrajudicial information about Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences. This conclusion follows from his finding that she had not been impartial. The People's burden of proof had been "lightened" insofar as she was concerned because she had herself found all or at least part of the requisite "proof" in the information in question.

Finally, Judge Hoffman was sound in determining that Carpenter's defense had been "contradicted," within the meaning of *Martinez*, by Juror Durham's receipt of extrajudicial information about his Santa Cruz "Trailside Murder" convictions and death sentences. This conclusion too follows from his finding that she had not been impartial. Carpenter's defense in both guilt and penalty phases that he was not the "Trailside Murderer" had been "contradicted" by the very information she had received.

From the foregoing it follows, a fortiori, that there is at least a substantial likelihood that Juror Durham was impermissibly influenced by her receipt of extrajudicial information about Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences. That is because Judge Hoffman correctly found that she had, *in fact*, not been impartial.

It goes without saying that, as Judge Hoffman concluded, harmless-error analysis may not be invoked in an effort to salvage the challenged judgment.

Under the United States Constitution, harmless-error analysis "presupposes," inter alia, "a trial . . . at which the defendant . . . may present evidence and argument before an *impartial* . . . jury." (*Rose* v. *Clark* (1986) 478 U.S. 570, 578 [92 L.Ed.2d 460, 470, 106 S.Ct. 3101], italics added, fn. omitted.) The same is true under the California Constitution. (See *People* v. *Cahill* (1993) 5 Cal.4th 478, 501-502 [20 Cal.Rptr.2d 582, 853 P.2d 1037].)

Thus, when as here the jury was not impartial because one of its members was wanting in that regard, a necessary "presupposition" of harmless-error analysis is lacking. Consequently, such analysis is unavailable. For the absence of jury impartiality is a defect that "require[s] reversal [or vacation] without regard to the evidence in the particular case." (*Rose* v. *Clark*, *supra*, 478 U.S. at p. 577 [92 L.Ed.2d at p. 470] [under U.S. Const., Amend. XIV, § 1 ("due process of law" guaranty)]; see *People* v. *Cahill*, *supra*, 5 Cal.4th at pp. 501-502 [under Cal. Const., art. VI, § 13].) Surely, the absence of jury impartiality is not an ordinary " 'trial error.' " (*Arizona* v. *Fulminante* (1991) 499 U.S. 279, 307 [113 L.Ed.2d 302, 330, 111 S.Ct. 1246] (maj. opn. of Rehnquist, C. J.).) Rather, it is a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards." (*Id.* at p. 309 [113 L.Ed.2d at p. 331].) The matter is settled. (*Johnson* v. *Armontrout* (8th Cir. 1992) 961 F.2d 748, 756.)

Therefore, under the Constitutions of both the United States and California—and without regard to *Martinez*, on the one side, and *Marshall*, *Holloway*, and *Hitchings*, on the other—Judge Hoffman's correct finding that Juror Durham had, in fact, not been impartial *compels* the conclusion that the challenged judgment must be vacated.

IV

As they commence their analysis, the majority present certain decisions of the United States Supreme Court as though they stated the "applicable law" (maj. opn., *ante*, at p. 647, initial capitalization and boldface omitted)—which, in fact, they do not.[7] The snippets of language they gather together, however, do betray the "pragmatic approach" they follow (maj. opn., *ante*, at

[7]Thus, *Smith* v. *Phillips* (1982) 455 U.S. 209 [71 L.Ed.2d 78, 102 S.Ct. 940] teaches that juror bias should not be implied by law in a federal habeas court, *not* that it may not be found in fact by a state trial court—as is the case here. *Ruhlen* v. *Spain* (1983) 464 U.S. 114 [78 L.Ed.2d 267, 104 S.Ct. 453] is to the same effect. Similarly, *McDonough Power Equipment, Inc.* v. *Greenwood* (1984) 464 U.S. 548 [78 L.Ed.2d 663, 104 S.Ct. 845] teaches that, in a federal civil action, juror bias should not be implied by law but may be found in fact. *Romano*

p. 648: to ignore the factual findings—supported by substantial evidence—of a respected and thoughtful superior court judge and thereby uphold a verdict poisoned by serious juror misconduct.

In a crucial point, the majority deny that Judge Hoffman found that Juror Durham had not been impartial. To be sure, he did not declare, in these very words, that "Juror Durham had not been impartial." But what else could he have meant when he made the statements quoted at length above? Recall that he concluded with specific reference to the extrajudicial information Juror Durham had received about Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences: "I definitely believe it affects her impartiality." Are these the words of a man who did *not* find that she "was biased"? (Maj. opn., *ante*, at p. 655.)

That Judge Hoffman employed "would's" and "could's" and similar terms is no indication of anything other than a finding that Juror Durham had not been impartial. He was compelled to use the language of inference inasmuch as she went so far as to perjuriously deny her receipt of extrajudicial information about Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences. Since she refused to own up to her misconduct, he was forced to deduce its effect.

Further, by stating his belief, in a contrary-to-fact condition, that the challenged judgment could have been salvaged under harmless-error analysis "had this jury been completely impartial," Judge Hoffman implied that "this jury had *not* been completely impartial." Manifestly, the source of the taint was Juror Durham.

If there remains any doubt about the matter, I direct attention to the following. As noted, Judge Hoffman stated that he intended to—and did in fact—send a letter to both the Attorney General and the San Diego District Attorney requesting that each review Juror Durham's conduct "for possible criminal prosecution under Penal Code Section 96." As also noted, that provision subjects to criminal sanction any juror who "*[w]illfully and corruptly* permits any communication to be made to him, or receives any . . . information relating to any cause or matter pending before him, except according to the regular course of proceedings." (Italics added.) Such a request would be reasonable only if, as is plainly the case, Judge Hoffman had found that Juror Durham had not been impartial.

Under all that they say, the majority appear to disagree with Judge Hoffman that Juror Durham had not been impartial. This in spite of the fact

v. *Oklahoma* (1994) 512 U.S. ___ [129 L.Ed.2d 1, 114 S.Ct. 2004] does not even involve juror bias at all. Contrary to the majority's implication, it manifestly does not erect an obstacle against finding bias in a juror under circumstances such as those disclosed here.

that he could, and did, take his measure of the woman as she perjured herself on the witness stand—and they cannot do so.

In part, the majority seem to say, Judge Hoffman did his job wrong: he "did not make any credibility-based finding that [Juror Durham] was biased . . . ." (Maj. opn., *ante*, at p. 655.) Perhaps not expressly. But, clearly, by implication. Recall his rhetorical question about Juror Durham and her receipt of extrajudicial information about Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences: "And then you get to the—then you get to the hearing and the confrontation, she denies it. . . . Now what inferences can you draw from the fact that when she's confronted, she denies it, as to her impartiality[?]" Evidently, he based his finding on Juror Durham's lack of impartiality, at least to some extent, on adverse inferences he drew from her perjury.

In other part, the majority seem to say, Judge Hoffman did his job with too sensitive a conscience.

The majority assert: "Many jurors, in the middle of a long and notorious trial, might, for many reasons unrelated to bias, be reluctant to go forward and actively inject themselves into the proceedings." (Maj. opn., *ante*, at p. 656.) Many jurors, perhaps. But Juror Durham? She was expressly found by Judge Hoffman to have been an "outspoken person," indeed a "very outspoken" person. Together with the other jurors, she had been admonished to come forward in the event that she should receive extrajudicial information about the case. She had evidently seen what might happen if she did: Two prospective jurors had received such information; both had come forward; and both had been excused. Whether Juror Durham intentionally suppressed her receipt of the information in question in order to remain on the jury is not clear. But what *is* clear is this: Before her service as a juror, she had been employed as a nurse working in hemodialysis. During her service, she continued to receive her full salary; she enjoyed more time at home with her family; and, to her relief, she avoided exposure to the human immunodeficiency virus (HIV), which is believed to cause acquired immunodeficiency syndrome (AIDS).

The majority also assert: Juror Durham "might not [have] attach[ed] the same importance to" extrajudicial information about Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences "as [did] the parties." (Maj. opn., *ante*, at p. 656.) Why then did she attempt to cover up her receipt of such information, immediately after she revealed her misconduct in her conversation with Lustig and Duran, in the midst of the guilt phase? She had obtained the information in question from newspaper accounts, either directly or, more likely, through her husband. She canceled her newspaper subscription *on or as of the date of the conversation in question.*

The majority further assert: "[T]he fact [Juror Durham] covered up *after* the verdict when she was challenged in order to protect herself . . . does not show bias *during the trial, deliberations and verdict.*" (Maj. opn., *ante*, at p. 567, italics in original.) To the extent that the majority imply that she covered up only *after* the verdict, that "fact" is no fact at all. As noted, she covered up *immediately, in the very midst of the guilt phase.* Her conduct suggests something other than strict impartiality.

The majority lastly assert: "The fact [Juror Durham] did not reveal her knowledge to the rest of the jury" "tends to negate the inference [she] was biased" and "tends to show [she] intended the forbidden information *not* to influence the verdict." (Maj. opn., *ante*, at p. 657, italics in original.) That "fact" too is no fact at all. Judge Hoffman made no finding in that regard whatsoever, either express or implied.

In addition to denying that Judge Hoffman found that Juror Durham had not been impartial, the majority assert that he ignored the record of the Marin "Trailside Murder" trial. They say that he found that the extrajudicial information about Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences "inherently prejudicial in and of itself without reference to the rest of the record. [He] stated the evidence of guilt (as well as that supporting the penalty determination) was 'overwhelming,' but felt legally precluded from considering this evidence." (Maj. opn., *ante*, at p. 655.)

Judge Hoffman *did not* find that the extrajudicial information about Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences was prejudicial either *automatically* or *in isolation.* He expressly recognized that "jury misconduct is not per se reversible . . . ." He also expressly recognized that he was required to conduct a "review of the entire record" in order to determine whether "the defendant has suffered [any] prejudice." This defeats the majority's unsupported assertion that he "felt legally precluded from considering th[e] evidence" at the Marin "Trailside Murder" trial, and found prejudice on the basis that the information in question was "inherently prejudicial in and of itself without reference to the rest of the record." (Maj. opn., *ante*, at p. 655.)

This is not to say that Judge Hoffman did not treat the extrajudicial information about Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences as "inherently prejudicial." Of course he did—essentially to distinguish this case from those in which a "presumption of prejudice has been rebutted." Rightly so. Would not *any* juror at *any* trial become less kindly disposed toward Carpenter on learning that he had been convicted of, and sentenced to death for, the Santa Cruz "Trailside Murders"? Such

information, even in the abstract, casts an unfavorable light on its subject. More significant, would not *any* juror *at the Marin "Trailside Murder" trial* become less kindly disposed toward Carpenter on learning that he had been convicted of, and sentenced to death for, the Santa Cruz "Trailside Murders"? Such information, on the particular facts of this case, would have all but answered the two ultimate questions that the juror had to address: "Is Carpenter the 'Trailside Murderer'? And, if so, what should he suffer?" Certainly, Judge Hoffman did nothing wrong in treating the information in question as "*inherently* prejudicial." Indeed, he anticipated the "substantial likelihood" test of *Marshall*, *Holloway*, and *Hitchings*, which turns on whether the information " 'is *inherently* likely to have influenced the juror' " (*People* v. *Marshall*, *supra*, 50 Cal.3d at p. 951, italics added). As he made plain, he treated the information in question as "inherently prejudicial" *because it was prejudicial within the context of the Marin "Trailside Murder" trial.* So much for the majority's unsupported assertion that he "felt legally precluded from considering this evidence." (Maj. opn., *ante*, at p. 655].)

This is also not to say that Judge Hoffman did not "feel legally precluded." He did. He "felt legally precluded"—as the majority really do not—from applying harmless-error analysis because he found that Juror Durham had not been impartial.

Under all that they say, the majority appear to disagree with Judge Hoffman that the extrajudicial information about Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences was "inherently prejudicial." How can they do so? He had reviewed the entire record of the Marin "Trailside Murder" trial. *They expressly admit that they have not.* He had presided over that trial; he constantly referred to its record in the course of this proceeding. *They have practically no acquaintance with that trial or its record.*

"[E]vidence of most of the Santa Cruz County *crimes* was presented to the jury," say the majority, although they themselves have examined none of it: "All [Juror Durham] learned out of court was the verdict of the first jury." (Maj. opn., *ante*, at p. 655, italics in original.) Is *that* "all" that she learned? That another jury had found Carpenter guilty of the Santa Cruz "Trailside Murders" and fixed the punishment at death? Is *that* "all"? Perhaps the effect of the extrajudicial information might have been reduced somewhat if it had been received by Juror Durham only *after* the cause had been submitted to the jury—that is, only *after* all the evidence had been presented and could then be considered. The information in question, however, had been received much earlier: most likely, to extrapolate from Juror Durham's cover-up, even before the commencement of the guilt phase; surely no later than the

middle of that phase, as established by the words she spoke on March 26, 1988, to the effect that "We are not supposed to know this, but Carpenter has already been convicted and sentenced to death for the Santa Cruz 'Trailside Murders.' "

The majority are right in stating that "[a] court's determination during trial that certain evidence is more prejudicial than probative, and therefore should not be admitted, is very different from a determination after trial whether the jury's acquisition of that evidence was prejudicial in light of the entire record." (Maj. opn., *ante*, at p. 655, fn. 2.) They are wrong, however, in implying that Judge Hoffman made only the first "determination" here. Prior to trial, he ruled that Carpenter's Santa Cruz "Trailside Murder" convictions and death sentences were substantially more prejudicial than probative and barred their introduction. After trial, on habeas corpus, he ruled consistently that extrajudicial information relating to those convictions and death sentences had impermissibly influenced Juror Durham: "I definitely believe it affects her impartiality." The majority, of course, are in no position to disagree. As stated, they expressly admit that they have not reviewed the entire record of the Marin "Trailside Murder" trial.

As they turn from analysis to disposition, the majority expressly admit, as they must, that they have not reviewed the entire record of the Marin "Trailside Murder" trial. Further, they expressly admit, as they must, that they need the entire record "to confidently review" the matters underlying Judge Hoffman's judgment and order. (Maj. opn., *ante*, at p. 659.)

What follows from these facts?

Under the rule of appellate procedure that is generally applicable, an appellant's appeal must fail for want of an adequate record and, accordingly, the judgment or order appealed from must be affirmed. (E.g., *Scala* v. *Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 367, fn. 4 [90 Cal.Rptr. 592, 475 P.2d 864].) That means, of course, the Director of Corrections' challenge must be rejected and, as a result, Judge Hoffman's decision must be upheld. Such an outcome is practically compelled under the facts of this case: the Director of Corrections' sole argument against Judge Hoffman's conclusion that Juror Durham's misconduct was prejudicial is predicated on the assertedly "overwhelming evidence" that the *absent* record of the Marin "Trailside Murder" trial sets out. The foregoing rule of appellate procedure has special applicability here: Juror Durham committed misconduct. That is undisputed and indisputable. Her misconduct raises a presumption of prejudice. That too is undisputed and indisputable. If, then, as the majority assert, "[w]e cannot now . . . decide the question of prejudice either way" (maj. opn., *ante*, at p.

659), *we must therefore conclude that the presumption of prejudice has not been rebutted and proceed to affirm Judge Hoffman's judgment and order.*

There is, however, no need to rely on a "mere" rule of appellate procedure when a principle of greater force and dignity lies at hand.

Section 13 of article VI of the California Constitution declares: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The majority altogether ignore the constitutional provision. They effectively admit that they have not conducted an "examination of the entire cause, including the evidence," but nevertheless go on to "set aside" Judge Hoffman's judgment and order. Certainly, they cannot even claim to discern a "miscarriage of justice" since they state that they "cannot now . . . decide the question of prejudice either way." (Maj. opn., *ante*, at p. 659.)

Even less persuasive than other aspects of the majority's discussion is the reason they give for refusing to follow the ordinary course taken by reviewing courts in circumstances such as assertedly obtain here—that is, vacate the judgment and order, which were rendered under *Martinez*, and remand the cause with directions to reconsider the matter in light of *Marshall*, *Holloway*, and *Hitchings*, which have superseded *Martinez*. The majority say that "little would be gained by a remand." (Maj. opn., *ante*, at p. 658.) Not so. Much would be gained. But none of it to their liking. For it is practically a foregone conclusion that, if Judge Hoffman were to reconsider the matter in light of *Marshall*, *Holloway*, and *Hitchings*, he would find himself compelled to reinstate his judgment and order. As explained, if anything, the *Martinez* court set a *higher* threshold for relief than we subsequently did in *Marshall*, *Holloway*, and *Hitchings*. *Marshall*, *Holloway*, and *Hitchings* require injury to the defendant only as a *substantial likelihood*. *Martinez*, by contrast, may be read to require such injury as an *actual fact*. Recall that Judge Hoffman found—correctly—that Juror Durham had, *in fact*, not been impartial. It follows, a fortiori, that there is at least a substantial *likelihood* that she was impermissibly influenced.

Although the majority give a reason for refusing to remand, they give none at all for declining to vacate submission of the cause in this court and await receipt of the record of the Marin Trailside Murder" trial, which is

now due. They give no reason because there is none: the merits of their approach may be determined by the absence of any rationale.

In conclusion, as the author of the majority opinion himself recently declared: "'[T]here is no judge better suited for making a determination of the issues raised in petitioner's petition than the original trial judge.'" (*People* v. *Duvall* (1995) 9 Cal.4th 464, 491 [37 Cal.Rptr.2d 259, 886 P.2d 1252] (conc. & dis. opn. of Arabian, J.).) In this proceeding, that judge is Judge Hoffman. His decision should not be disturbed.[5]

V

For the reasons stated above, I would affirm Judge Hoffman's judgment and order.

Lucas, C. J., and Kennard, J., concurred.

[5]I note, in passing, that Carpenter is not compelled to accept the majority's invitation to file a habeas corpus petition realleging Juror Durham's prejudicial misconduct . Since there has been a "change in the applicable law" (*In re Clark* (1993) 5 Cal.4th 750, 767 [21 Cal.Rptr.2d 509, 855 P.2d 729]) as *Marshall*, *Holloway*, and *Hitchings* have superseded *Martinez*, he may, apparently, file such a petition in the San Diego Superior Court—whose subject matter jurisdiction under section 10 of article VI of the California Constitution even the majority must recognize. Judge Hoffman has certainly shown himself to be faithful to the law and careful with the facts. He is thoroughly familiar with all the issues material here. (It goes without saying that Carpenter may also file a petition in the United States District Court for the Southern District of California.)

APPENDIX B

[No. S011273. May 17, 1995.]

In re DAVID JOSEPH CARPENTER on Habeas Corpus.

[Modification of opinion* (9 Cal.4th 634; 38 Cal.Rptr.2d 665, 889 P.2d 985).]

HEADNOTES

Classified to California Digest of Official Reports

(2) **Criminal Law § 612—Appellate Review—Scope of Review—Discretion of Trial Court—Evidence—Credibility of Witnesses.**—The power to judge the credibility of witnesses and to resolve conflicts in the testimony is vested in the trial court, and its findings of fact, express or implied, must be upheld if supported by substantial evidence.

THE COURT.—The opinion herein, filed on March 6, 1995, and printed in the advance report at 9 Cal.4th 634, is modified as follows:

1. At 9 Cal.4th at page 646, advance report, after the first sentence of the last, partial paragraph, which sentence ends with the words, "resolved a credibility dispute," the following is added: "The power to judge the credibility of witnesses and to resolve conflicts in the testimony is vested in the trial court, and its findings of fact, express or implied, must be upheld if supported by substantial evidence. (*People* v. *Leyba* (1981) 29 Cal.3d 591,

*These modifications require adding a new headnote (2) on page 635 to read as set out above. Advance report headnotes (2), (3a-3c), (4a, 4b), and (5) to (9), pages 635-639, will be renumbered (3), (4a-4c), (5a, 5b), and (6) to (10) in the bound volume report. Renumbered headnote (10), page 639, lines 18-26 will be changed to read: "full factual record regarding the misconduct with all conflicts in the evidence resolved and with the relevant historical facts found, remand was not appropriate. However, the Supreme Court had not yet fully reviewed the entire record. Although it had taken judicial notice of the records in the underlying trial, which gave it a general idea of what the trial was about, since the noticed records were uncertified, such was inadequate to the task of making a final determination of prejudice. Thus, it was prudent not to make a definitive determination of prejudice, but to reserve it pending a cause in which the appellate record, as well as the record in the habeas corpus proceedings, was before the court." Movement of text will be made affecting pages 646-648, 654-663, and 686-687.

6. At 9 Cal.4th at page 658, advance report, last full paragraph, the first sentence, commencing with the words, "As discussed above," and ending with the words, "must be consulted," is modified to read: "As discussed above, in determining prejudice to Carpenter, the record of the underlying trial, in addition to the habeas record, must be consulted." The second to the last sentence of that paragraph, commencing with the words, "Because there is," and ending with the words, "by a remand," is modified to read: "Because there is now a full factual record regarding the misconduct with all conflicts in the evidence resolved and with the relevant historical facts found, little would be gained by a remand."

7. At 9 Cal.4th at pages 658-659, advance report, the second and third sentences of the paragraph on those pages, commencing with the words, "To be sure," and ending with the words, "*trial* is different," are modified to read: "To be sure, we have carefully considered the *habeas corpus* record, and have determined that it alone does not entitle Carpenter to relief; the trial court erred in finding otherwise. But the record of the *trial*, which is not before us in this cause, is different, and must be considered before the merits of Carpenter's underlying claim can be finally determined." The last two sentences of that paragraph, commencing with the words, "We grant," and ending with the words, "determination of prejudice," are modified to read: "We grant that request (Evid. Code, § 459, subd. (a)), limited to noncontroversial facts regarding the trial referred to in this opinion that are also reflected in the habeas corpus record. But, although judicial notice properly gives us a general idea of what the trial was about, because it is uncertified, we find it inadequate to the task of making a final determination of prejudice to Carpenter. Therefore, we cannot, and do not, consider it for that purpose at this time."

8. At 9 Cal.4th at page 659, the last two sentences of the first full paragraph, commencing with the words, "We cannot now," and ending with the words, "record is before us," are modified to read: "We cannot now effectively examine the appellate record to confidently review these matters and decide whether Carpenter was prejudiced. Because of this, it seems prudent not to make a definitive determination of this question at this time, but to reserve it pending a cause in which the appellate record, as well as the record in this cause, is before us."

This modification does not affect the judgment.

The dissenting opinion herein, filed on March 6, 1995, and reported in the advance sheets at page 659 et seq. of 9 Cal.4th, is modified as follows:

1. At page 685 of 9 Cal.4th in the advance sheets, the clause in the last paragraph, "'[w]e cannot now . . . decide the question of prejudice either

596-597 [174 Cal.Rptr. 867, 629 P.2d 961].) Here the court expressly resolved the conflicts in the testimony in Carpenter's favor, and we find substantial evidence supports these factual findings."

2. At 9 Cal.4th at page 654, advance report, first paragraph, immediately after the citation, "(*People* v. *Marshall*, *supra*, 50 Cal.3d at p. 931)," the following is added: "A biased adjudicator is one of the few 'structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards.' (*Arizona* v. *Fulminante* (1991) 499 U.S. 279, 309 [113 L.Ed.2d 302, 331, 111 S.Ct. 1246]; see also *Ross* v. *Clark* (1986) 478 U.S. 570, 577-578 [92 L.Ed.2d 460, 470-471, 106 S.Ct. 3101]; *Morgan* v. *Illinois* (1992) — U.S. —, — [19 L.Ed.2d 492, 502-503, 112 S.Ct. 2222, 2229-2230]; *People* v. *Cahill* (1993) 5 Cal.4th 478, 501-502 [20 Cal.Rptr.2d 582, 853 P.2d 1037].)"

3. At 9 Cal.4th at page 655, advance report, the first sentence of the second full paragraph, commencing with the words, "The court also erred," and ending with the words, "guilt phase prejudice," is modified to read: "The court also erred in the rest of its penalty determination and in its finding of guilt phase prejudice."

4. At 9 Cal.4th at page 656, advance report, the first sentence of the first full paragraph, commencing with the words, "During a long," is modified to read: "During a long and highly publicized trial, the court and parties attempted to prevent the jury from learning of the verdict in the previous trial (although not from hearing evidence of most of the other crimes themselves)."

5. At 9 Cal.4th at page 658, advance report, the first paragraph immediately following the caption, "IV. DISPOSITION," commencing with the words, "We thus conclude," and ending with the words, "proper disposition," is modified to read: "We conclude that, on the basis of the habeas corpus record, the only one before us in this cause, Carpenter is not entitled to relief, and the court below erred in finding otherwise. The court thus erred in setting aside the judgment of death, which error was prejudicial to the appealing party, in effect the People. We therefore reverse the judgment granting the petition for writ of habeas corpus. We must now decide the precise disposition. We find that, although an examination of the entire record in this habeas corpus cause, including the evidence presented at the habeas corpus hearing, suffices to find that the court erroneously set aside the judgment in the underlying action, that record is not sufficient to decide whether Carpenter could ever be entitled to relief. This latter determination requires an examination, not only of the record in this cause, but also the record in the underlying appeal, which is not before us in this matter."

way,' " is modified to read, " '[w]e cannot now . . . decide whether Carpenter was prejudiced.' "

2. At page 686 of 9 Cal.4th in the advance sheets, the sentence and citation in the third full paragraph, "Certainly, they cannot even claim to discern a 'miscarriage of justice' since they state that they 'cannot now . . . decide the question of prejudice either way.' (Maj. opn., *ante*, at p. 659.)," are modified to read, "Certainly, they cannot even claim to discern a 'miscarriage of justice' since they state that they 'cannot now . . . decide whether Carpenter was prejudiced.' (Maj. opn., *ante*, at p. 659.) Their implication that Judge Hoffman's 'error' is 'prejudicial' because the subsequent judgment and order are adverse to the Director of Corrections merely begs the question. Otherwise, any error would be 'prejudicial' per se because any subsequent judgment or order is necessarily adverse to the losing party. Obviously, Judge Hoffman's 'error' could have prejudiced the Director of Corrections *if and only if* Juror Durham's misconduct did not in fact prejudice Carpenter. But the majority state that they cannot now determine whether that condition was satisfied."

APPENDIX C

S011273

IN THE SUPREME COURT OF CALIFORNIA

In Re DAVID JOSEPH CARPENTER On Habeas Corpus

Petition for rehearing DENIED.

Lucas, C.J., Mosk, J. and Kennard, J. are of the opinion the petition should be granted.

Opinion modified.

Chief Justice

ORIGINAL

No. 95-5996

(3)

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DAVID J. CARPENTER,

Petitioner,

v.

JAMES H. GOMEZ, Director, California Department of Corrections, and ARTHUR CALDERON, Warden, California State Prison at San Quentin,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED

Depending on the circumstances, may juror misconduct be subject to a harmless error analysis?

TABLE OF AUTHORITIES, CONT'D

Statutes

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995
No. 95-5996

DAVID J. CARPENTER,
Petitioner,

v.

JAMES H. GOMEZ, Director, California Department of Corrections, and ARTHUR CALDERON, Warden, California State Prison at San Quentin,
Respondents.

OPINION OR JUDGMENT BELOW

Petitioner seeks review of *In re David Joseph Carpenter on Habeas Corpus*, 9 Cal. 4th 634, 889 P. 2d 985, 38 Cal. Rptr. 2d 665 (1995), in which the Supreme Court of California reversed a trial court's order granting a Writ of Habeas Corpus. The opinion is set forth in Petitioner's Appendix A. The California Supreme Court's order modifying its opinion is reported at 10 Cal. 4th 256a, 95 L.A. Daily Journal D.A.R. 6368 (1995). The order is set forth in Petitioner's Appendix B.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court to review a final decision of the highest court of the State of California for error under the Constitution of the United States pursuant to Title 28, United States Code, section

1257(a). The Supreme Court of the State of California filed its opinion on March 6, 1995. Carpenter's petition for a rehearing was denied and modifications to the opinion were filed on May 17, 1995. Petitioner's request for extension of time in which to file a Petition for Writ of Certiorari was granted by Justice O'Connor on August 7, 1995, and time in which to file a Petition for Writ of Certiorari was extended to September 14, 1995. A Petition for Writ of Certiorari was filed on September 14, 1995.

CONSTITUTIONS, STATUTES OR REGULATIONS

Petitioner relies upon the Fifth, Sixth, Eighth and Fourteenth amendments to the Constitution of the United States. These provisions are set forth in the Petition for Writ of Certiorari at page two.

STATEMENT OF THE CASE

Petitioner, David Joseph Carpenter, was convicted of capital murder and sentenced to the death penalty.

In 1985-1988, following a change of venue because of pretrial publicity, Carpenter was tried in the County of San Diego for five capital murders, two rapes, and one attempted rape, which had occurred in the County of Marin.[1] Following

1. Previously, in 1983-1984, following a change of venue because of pretrial publicity, Carpenter was tried in the County of Los Angeles for two capital murders, an attempted murder, one rape and an attempted rape, which had occurred in the County of Santa Cruz. Following his conviction of these crimes, he was sentenced to the death penalty for each of the capital murders. The Los Angeles judgment is pending review in the Supreme Court of the State of California.

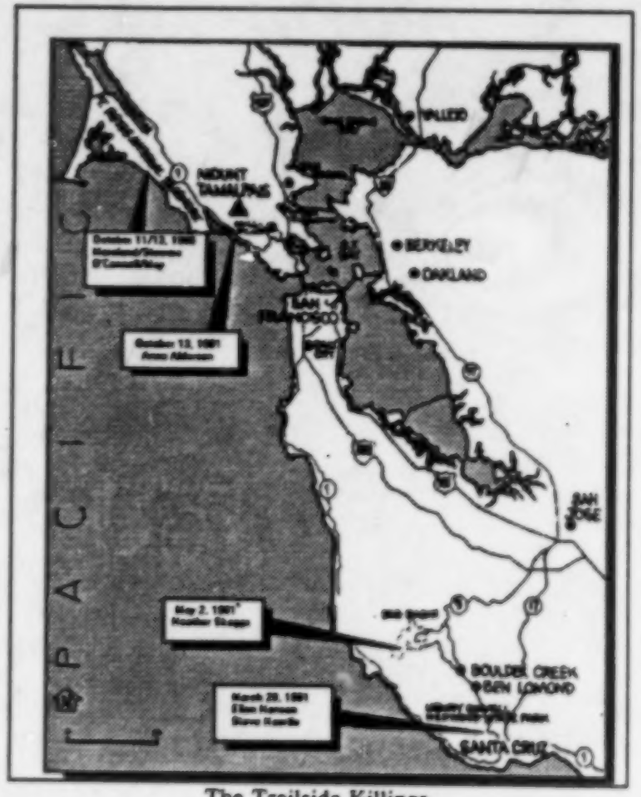
his conviction of these crimes, he was sentenced to the death penalty for each of the capital murders.

While the San Diego judgment of death was pending review in Supreme Court of the State of California, Carpenter sought a Writ of Habeas Corpus from the trial court due to juror misconduct. On June 15, 1989, the Superior Court of the State of California in and for the County of San Diego granted the Petition for Writ of Habeas Corpus and vacated the judgment of conviction and death penalty.

On March 6, 1995, the Supreme Court of the State of California reversed the judgment granting the Writ of Habeas Corpus and denied the petition without prejudice to Petitioner to file a new petition in the California Supreme Court. Although the San Diego death penalty judgment is pending review in the California Supreme Court, Petitioner nevertheless seeks review of the California Supreme Court's decision reversing the judgment granting a Writ of Habeas Corpus.

STATEMENT OF THE FACTS

During a period which began during the Columbus Day holiday weekend of 1980 and ended in early May 1981, Carpenter prowled the trails at Mount Tamalpais and the Point Reyes National Seashore in Marin County and Henry Cowell State Park and Big Basin State Park in Santa Cruz County, where he attacked, sexually assaulted and brutally murdered Cynthia Moreland, Richard Stowers, Anne Alderson, Diane O'Connell, Shauna May, Ellen Hansen and Heather Skaggs, and where he seriously wounded Steve Haertle.



The Trailside Killings

On October 11, 1980, Cynthia Moreland and Richard Stowers were shot and killed while hiking the trials at Point Reyes National Seashore in Marin County. A .38 caliber

projectile, or projectile fragment, was recovered from each of the victims.

On October 13, 1980, Anne Alderson was raped, shot and killed while she was hiking the trials at Mount Tamalpais in Marin County. A .38 caliber projectile fragment was found about twelve inches from the victim's head.

On November 28, 1980, Diane O'Connell and Shauna May were shot and killed while hiking the trails at Point Reyes National Seashore in Marin County.[2] A .38 caliber projectile, or projectile fragment, was recovered from each of the victims.

On March 28, 1981, Ellen Hansen was shot and killed and her boyfriend, Steve Haertle was shot and wounded while hiking the trails at Henry Cowell State Park in Santa Cruz County.[3] A .38 caliber projectile was recovered from Hansen's body.

On May 2, 1981, Heather Skaggs was raped, shot and killed at Big Basin State Park in Santa Cruz County. A .38 caliber projectile was recovered from the victim.

Ballistics tests revealed that the projectiles recovered from each of the victims were fired from the same firearm, a .38 caliber Rossi revolver, serial number D484341, traced to Carpenter. Steve Haertle and another eyewitness positively identified Carpenter as the person who shot him and

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2. Prior to killing O'Connell and May, Carpenter attempted to rape O'Connell and did rape May.

3. Prior to killing her, Carpenter also attempted to rape Hansen.

Ellen Hansen. Each of the crime scenes was remarkably similar in its seclusion from nearby hiking trails.

Carpenter claimed someone else shot and killed the victims and that he was elsewhere when the killings occurred.

ARGUMENT

THE PETITION SHOULD BE DENIED INASMUCH AS THE SAN DIEGO JUDGMENT AND DEATH PENALTY REMAIN SUBJECT TO REVIEW IN THE CALIFORNIA SUPREME COURT. ALTERNATIVELY, THE PETITION SHOULD BE DENIED INASMUCH AS THE CALIFORNIA SUPREME COURT CORRECTLY DETERMINED JUROR MISCONDUCT INVOLVING EXPOSURE TO EXTRANEOUS INFORMATION IS SUBJECT TO AN HARMLESS ERROR ANALYSIS.

Petitioner seeks review of whether juror misconduct may ever be deemed to be harmless error. Respondent maintains the California Supreme Court correctly determined that certain juror misconduct is subject to an harmless error analysis and that further review of this question in this case, at this time, is not necessary.

Carpenter was tried first in Los Angeles for capital murders committed in Santa Cruz County and then in San Diego for capital murders committed in Marin County. For the guilt phase of the San Diego trial, the trial court permitted evidence of the facts underlying all of the crimes committed in both Santa Cruz County and Marin County, except those against Heather Skaggs, which were excluded as substantially more prejudicial than probative under California Evidence Code section 352. For the penalty phase, it permitted evidence of the facts underlying all the crimes. For both phases, it barred evidence of Carpenter's Santa Cruz/Los Angeles convictions and death sentence as substantially more prejudicial than probative.

Throughout jury selection and the trial, the trial court repeatedly admonished the prospective jurors, and then the jury, that it was their duty not to discuss the case among themselves or with others and to avoid publicity related to the case. Barbara Durham was selected as one of twelve jurors and became the jury foreman.

Following the San Diego trial and verdicts, which found him guilty of five counts of murder including special circumstances, as well as several other crimes, i.e., rape and attempted rape, and which determined that the penalty to be imposed was death, Carpenter was sentenced to the death penalty.

Two months after being sentenced, in the Superior Court of the State of California in and for the County of San Diego Carpenter filed a Petition for Writ of Habeas Corpus which essentially claimed he was denied a fair trial due to juror misconduct. In particular, Carpenter contended that, sometime during the trial proceedings, Juror Barbara Durham, the jury foreman, learned that Carpenter previously had been convicted of murder and had been sentenced to death and that she failed to disclose this knowledge to the trial judge. The matter was assigned to the trial judge who issued an order to show cause.

Following the filing of a return and traverse, an evidentiary hearing was held. At the evidentiary hearing, the testimony of several witnesses was taken. According to Michael Lustig and Donna Duran, during the evening of March 26, 1988, while at the Lakeside Resort, a Cuyamaca night club, they met

Barbara Durham and her husband with whom they were acquainted.[4] According to Lustig and Duran, Barbara mentioned she was then serving as a juror on the trailside murder case. Barbara further stated that, although she was not suppose to know about it, she was aware that the defendant previously was convicted of similar crimes in another county. According to Lustig and Duran, Barbara stated she either read about the prior case in the newspaper, or her husband told her about it. According to Lustig, Barbara also stated she was aware the defendant previously had been sentenced to suffer the death penalty and that Carpenter had been abused quite severely while growing up.

According to Barbara Durham, although she recalled talking to Lustig and Duran at the Lakeside Resort, the conversation involved only a passing reference to her jury. According to Barbara, when asked what she had been doing lately, she stated she was on jury duty. When asked if she was involved with the Peyer case,[5] she said she was not involved in that case. When asked which case she was involved with, she said it was the Trailside Killer case. She mentioned she had been involved in the case for several months

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4. Also present were Maria Contreras-Diego, Lustig's housekeeper, and Contreras-Diego's son, Lewis. According to Contreras-Diego, after dinner the Durhams were invited to join them at the Lustig table. Although Contreras-Diego heard Barbara Durham speak about a trial, she paid no attention to the conversation.

5. The Peyer case involved the murder of a young woman by a California Highway Patrol officer, Craig Peyer, which received extensive media attention.

and it was expected to continue on into the summer months. Other discussion, mostly between her and Duran, dealt with the problems involved in lengthy jury service and its impact on her job. At no time did she say she was not suppose to know it but had learned that defendant had been convicted of similar crimes in another county and had been given the death sentence. She never said she learned such information from her husband, nor did she describe the defendant as an average guy, or speculate why he would have committed the crimes charged, or describe the defendant's conduct during the trial. She did recall that she and Duran spoke about the Peyer case, that she said she often drove the same route involved in that case and that she had seen Peyer in the courthouse hallways on several occasions. Barbara unequivocally denied ever knowing that Carpenter previously had been convicted of murders in Santa Cruz County, or that he had received a death sentence until after the jury on which she served had been discharged.

According to Ron Durham, Barbara's husband, although prior to the Lakeside Resort event he was aware that Carpenter previously had been convicted of murder elsewhere and had been given a death sentence, he never revealed such knowledge to his wife while she was serving as a juror. However, he did discuss these facts with Tom Boulding and several other co-workers. They would ask him about the trial and whether Barbara was still involved with it. He responded that it was difficult to deal with because he knew about the case, but that they could not discuss it. He felt the San Diego trial

was a waste of taxpayers' money. He first discussed what he knew about Carpenter's prior history with his wife after the trial was completed. Barbara came home after it was over and said she had found out after the sentencing that Carpenter may be tried again for some other crimes. He then told her what he previously had learned, that Carpenter previously had been convicted of several murders elsewhere and given the death sentence. The evening they met Lustig at the Lakeside Resort there was a conversation about his wife's jury service, but it was limited to the length of time involved. The subject arose when Barbara was asked what she was doing. So far as he could recall, the conversation did not involve what he knew about the Carpenter case, or about what was occurring during the trial.

According to Thomas Boulding, a business acquaintance of Lustig, he considered Lustig untrustworthy. According to Boulding, he also knew Barbara Durham and frequently socialized with the Durham family. When he learned that Barbara was serving as a juror, he asked her how the case was going. Barbara responded that she could not talk about the case.

Following the evidentiary hearing, the superior court stated its findings of fact and conclusions of law and determined the alleged juror misconduct did occur. From all the evidence, the superior court determined that Juror Durham had committed misconduct by receiving information outside of court relating to the convictions and death sentence for the

Santa Cruz County crimes. By March 26, 1988, during the guilt phase, she had received the forbidden information from newspaper accounts, either directly, or indirectly through her husband. The superior court also found that Juror Durham had committed misconduct by discussing the case pending before her, and Carpenter's Santa Cruz convictions and death sentence, with nonjurors on March 26, 1988, while dining together at a San Diego resort.

Having found misconduct, the superior court ordered a separate hearing on prejudice. At the hearing, the parties presented extensive argument, but did not introduce additional evidence. Thereafter, the superior court further concluded the presumption of prejudice was not rebutted and that Carpenter was entitled to a new trial as to both guilt and penalty determinations. However, following its determination of prejudice, the superior court further commented, as follows:

> . . . I would find that, despite the information that Mrs. Durham knew . . . that any jury would have sentenced the defendant to the death penalty based upon the evidence presented and [I] would also find that the evidence was so overwhelming with respect to the defendant's guilt that, if the harmless error standard applied in this case, that Mrs. Durham's misconduct . . . would be harmless beyond a reasonable doubt.[6]

Thereafter, a superior court judgment and order was filed granting a Writ of Habeas Corpus and vacating the judgment of conviction and death sentence previously entered.

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6. A copy of the transcript setting forth the superior's court's findings is attached as an appendix.

The question of whether juror misconduct is subject to an harmless error analysis depends on whether the juror misconduct is a structural defect or a mere trial error. *Cf. Arizona v. Fulminate*, 499 U.S. 279, 307-310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). In *Fulminate*, this Court held that only a structural defect type error was not subject to an harmless error analysis. *Id.* at 309.

A careful examination of federal constitutional law suggests that juror misconduct, in its many forms, is not always a type of deficiency which undermines the integrity of the trial and thus must be treated as reversible error per se. Critical to a proper understanding of juror misconduct is recognition of whether the surrounding facts or circumstances reveals actual bias or imputed bias. *See Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).

In *Phillips*, during the state court trial one of the jurors applied for employment as an investigator in the district attorney's office. *Id.* at 212. When the defendant learned of this fact after trial, he unsuccessfully moved to set aside the verdict. The state trial court found that the employment application was an indiscretion but concluded it did not indicate prejudice against the defendant or an inability to decide guilt or innocence solely on the evidence. *Id.* at 213-214.

This Court found no constitutional infirmity in the verdict despite the obvious inherent motivation the job applicant may have had to reach a verdict favorable to the

prospective employer. *Smith v. Phillips*, 455 U.S. at 215. It rejected that "the law must impute bias to jurors," stating that the Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove *actual* bias." *Id.* at 215, italics added. This Court reviewed prior decisions and concluded that they

> . . . demonstrate that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; *it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote*. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

Smith v. Phillips, 455 U.S. at 217, italics added.[7]

Several subsequent cases further illustrate the need for actual bias before a harmless error analysis may not be employed. *Compare Rushen v. Spain*, 464 U.S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983) [finding improper ex parte communications between the trial court and jurors during a lengthy trial was harmless]; *and McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d

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7. Although there is a split of authority among the circuits, it further appears that the rule that juror misconduct is presumptively prejudicial (*Remmer v. United States*, 347 U.S. 227, 229-230, 74 S. Ct. 450, 98 L. Ed. 654 (1954)) was abandoned by *Phillips*. *United States v. Sturman*, 951 F.2d 1466, 1478 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992); *United States v. Madrid*, 842 F.2d 1090, 1093 (9th Cir. 1988), *cert. denied*, 488 U.S. 912.

663 (1984) [holding that a new trial was not required due to a juror's failure to disclose certain information during voir dire unless the juror's failure denied Respondents their right to an impartial jury].

Moreover, as several circuit courts have recognized, most errors are subject to harmless error analysis including some types of juror misconduct. *Compare United States v. McDonald*, 933 F.2d 1519, 1525 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 270, 116 L.Ed.2d 222 [ex parte communication between judge and juror harmless in light of overwhelming evidence of defendant's guilt]; *United States v. De La Vega*, 913 F.2d 861, 871 (11th Cir. 1990), *cert. denied sub nom. Carballo v. United States*, 114 L. Ed. 2d 99, 111 S.Ct. 2011 (1991) [jury foreman's actions in reading a book while on jury duty, showing passages to the jury and organizing deliberations based on the book was harmless error]; *United States v. Boylan*, 898 F.2d 230, 262 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 139 (1990) [circulation among jurors of magazine article referring to defendant's counsel was harmless]; *United States v. Chang An-Lo*, 851 F.2d 547, 559 (2d Cir. 1988), *cert. denied*, 488 U.S. 966 [a juror telling other jurors about article he read was harmless]; *United States v. Bolinger*, 837 F.2d 436, 439-440 (11th Cir. 1988), *cert. denied*, 486 U.S. 1009 (1988) [juror's reference to newspaper article in presence of nine other jurors was harmless because seven jurors had not been exposed to substance of article and evidence against defendant was overwhelming]; *and Lacy v.*

Gardino, 791 F.2d 980, 986-987 (1st Cir. 1986), *cert. denied*, 479 U.S. 888 [juror's peeling tape off exhibits revealing information about defendant's criminal record harmless because properly introduced evidence pointed to defendant's guilt and jury would have convicted defendant regardless of exposed information].

Moreover, so far as concerns the nature of the extraneous information, i.e., that Carpenter previously was convicted of capital murder and sentenced to the death penalty, this Court also recently held that evidence of a defendant's previous convictions and death sentence was irrelevant evidence which did not involve constitutional error and the admission of such evidence did not contravene the principle established in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). *Romano v. Oklahoma*, 512 U.S. ___, 114 S. Ct. 2004, 129 L. Ed. 2d 1, 9-14 (1994).

Following its consideration of these authorities, in this case the California Supreme Court determined that "when misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record and may be found to be nonprejudicial. *In re Carpenter*, 9 Cal. 4th 634, 653, 889 P.2d 985, 38 Cal. Rptr. 2d 665 (1995). To evaluate the impact of such information, the California Supreme Court set forth a two-part test. *Id.* at 653.

According to the California Supreme Court, reversible juror misconduct will be found if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror; or if the nature of the misconduct and surrounding circumstances as revealed in the "entire record" indicate it is substantially likely the juror was actually biased. *In re Carpenter*, 9 Cal. 4th at 653. In an extraneous information case, the "entire record" logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and the issues at trial, and the strength of the evidence against the defendant. *Id.* at 654.

Applying this test, in this case the California Supreme Court concluded (1) the superior court erred when, in the light of *Romano*, it analogized the misconduct and resultant extraneous information to error under *Caldwell*; (2) the superior court erred when it found the extraneous information was inherently prejudicial in and of itself without reference to the rest of the record including particularly its refusal to consider the "overwhelming" evidence of guilt, as well as the evidence supporting the penalty determination; and (3) that the surrounding circumstances do not necessarily reveal a substantial likelihood the juror was impermissibly influenced by the outside information. *In re Carpenter*, 9 Cal.4th at 655.

In this case, the California Supreme Court's determination was well supported by the habeas record before it. The outside information, which Juror Durham learned, was the fact that Carpenter previously had been sentenced to the death penalty. As the California Supreme Court recognized and applied, *Romano* clearly indicates that the extraneous information does not involve *Caldwell* error. Moreover, the extraneous information was not inherently prejudicial particularly in view of the fact that evidence of most of the Santa Cruz County crimes was presented to the jury, as well as the superior court's finding that evidence of guilt, as well as the evidence supporting the penalty determination, was "overwhelming."

Regarding the surrounding circumstances, nothing in this record reveals that the extraneous information actually impermissibly influenced the juror. Like the situation recognized in *Romano*, the effect on Juror Durham is speculative at best. It seems at least equally plausible that the evidence could have made her more inclined to impose a death sentence, or it could have made her less inclined to do so. In fact, the evidence here, which indicated that Juror Durham's husband was critical of the time and money spent on the San Diego/Marin trial because of the earlier death penalty, suggests that, if one inclination appears more likely, it is the inclination not to impose a death sentence.

Although Juror Durham failed to report what she learned, this fact too does not show bias. Many jurors, in

the middle of a long and notorious trial, might, for many reasons unrelated to bias, be reluctant to report what they know they should not have learned. It is not difficult to understand that a juror may fear the wrath of the trial judge, or of her fellow jurors and might prefer -- improperly to be sure -- to remain silent.

Although, Juror Durham also told nonjurors both what she knew and that she knew it was forbidden information and, after the verdict, denied the misconduct, it does not follow that she thereby failed to base her verdict solely on the evidence. Nothing in this habeas record supports a finding that she based her verdict on the extraneous information. Moreover, nothing in this habeas record indicates Juror Durham discussed the defendant's guilt or innocence or said anything suggesting she had prejudged the case. Finally, nothing in this habeas record indicates Juror Durham told any fellow jurors what she had learned.

Thus, the petition should be denied inasmuch as the California Supreme Court correctly determined that juror misconduct involving exposure to extraneous information is subject to an harmless error analysis. Furthermore, this petition should be denied because the San Diego judgment and death penalty remain subject to review in the California Supreme Court. The underlying judgment and death penalty are pending review in the California Supreme Court. In reversing the judgment granting a Writ of Habeas Corpus the California Supreme Court did so without prejudice and expressly invited

Petitioner to file a new petition in the California Supreme Court which would be considered after the appellate record has been certified.

CONCLUSION

For the reasons stated, Respondent respectfully requests the Petition for Writ of Certiorari be denied.

Dated: October 5, 1995.

Respectfully submitted,

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APPENDIX A

a 15-minute break, and then I'll give my decision.

(Recess.)

THE COURT: All right. In this case, on April 12 of this year, the Court found that Barbara Durham, the foreperson of the Carpenter jury, had committed juror misconduct and that she had violated the Court's admonition not to read about or discuss the David Carpenter case. And as a result of her misconduct, the Court finds that she learned that the defendant had been convicted of other similar crimes and that a death penalty sentence had been imposed on the defendant in the other case.

As a result of this misconduct -- a presumption of prejudice arises from any juror misconduct, which may be rebutted by an affirmative evidentiary showing that the prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable possibility of actual harm to the complaining party resulting from the misconduct which the Court finds to mean is that could have this affected any jurors' impartiality, and the Court should review the entire record to make that determination.

And unless the prosecution rebuts this presumption of prejudice by proof that no prejudice resulted, the cases hold that the defendant is entitled to a new trial.

Whether a defendant has been injured by jury misconduct in receiving evidence outside of court as the case of PEOPLE v. MARTINEZ has held is a three-prong test.

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The first part of the test is whether the juror's impartiality has been adversely affected; second, whether the prosecution's burden of proof has been lightened; and third, whether any asserted defense by the defendant has been contradicted by the misconduct.

The MARTINEZ court has held that if the answer to any of these questions is in the affirmative, that the defendant has been prejudiced and the conviction must be reversed. Both the prosecution and the defendant in this case agree that PEOPLE vs. MARTINEZ is the proper test for the Court to determine in evaluating the misconduct of Barbara Durham.

Since jury misconduct is not per se reversible, if the Court's review of the entire record demonstrates that the defendant has suffered no prejudice in any of the three areas described from the misconduct, then a reversal and new trial is not compelled.

In this case, the trial constituted two phases under Penal Code Section 190.1, and it requires that an analysis of the affect of the juror misconduct on each phase must be determined to determine what appropriate remedy, if any, exists for the defendant or the petitioner in the habeas corpus petition. And the Court has decided, first, to analyze the penalty phase of this case first.

The case of CALDWELL vs. MISSISSIPPI, a recent Supreme Court United States case, has held that it's constitutionally impermissible to rest a death sentence on a determination made by a juror who has been led to believe

that the responsibility for the defendant's death rests elsewhere in that juror's determination.

The Supreme Court has repeatedly said in that case and others that under the Eighth Amendment of the United States Constitution the qualitative difference of death from all other punishments requires correspondingly a greater degree of scrutiny of the capital sentencing determination.

In the CALDWELL case, the prosecutor argued that the ultimate responsibility for determining the appropriateness of the death sentence rests not with the jury, but with the appellate court which later reviews the case. The U.S. Supreme Court reversed the jury's death penalty, finding that that case, based upon that argument which impermissibly allowed the jury to believe that the ultimate responsibility for the death sentence was someone else's and not their own.

This has been -- similar reasoning has been used by the California Supreme Court in cases where the Court gives what has been known as the "erroneous BRIGGS instruction" to the jury which tells the jury in the penalty determination that the governor of the State of California has the power to commute any sentence of death that the jury would issue.

And the case of PEOPLE vs. RAMOS and other cases which follow have held that such an instruction to the jury is impermissible and would result in a reversal of any penalty phase case where such instruction was given.

Now, in evaluating in the CALDWELL case, the prejudicial effect of the prosecutor's argument, the Court there said they must recognize that that type of argument offers the jury a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals usually placed in an unfamiliar situation and called upon to make a difficult and uncomfortable choice.

They are confronted with evidence and argument on the issue of whether or not another person should live or die. And if they are asked to decide that issue on behalf of the community, moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them a substantial degree of discretion.

Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Now, in this case the Court found that Mrs. Durham had knowledge from her husband that Mr. Carpenter, because of a conviction in similar crimes, had been given the death sentence by another jury. In this Court's judgment, without any question, this information would serve to minimize her sense of responsibility in making the difficult and uncomfortable penalty determination.

She could very likely have concluded that since a

person can be executed only once, the second death penalty sentence, the one that she was contemplating, was a mere formality, and the real possibility for the defendant's -- responsibility for the defendant's death sentence belonged to the first jury and not herself.

This Court finds as a result of Mrs. Durham's knowledge with respect to Mr. Carpenter's prior death penalty sentence that the prosecution is unable to rebut the presumption of prejudice that arises out of the facts in this case and that the very real possibility of actual harm to the defendant as a result of Mrs. Durham's misconduct is completely apparent in the context of the penalty phase deliberations.

And so the Court finds, in applying the MARTINEZ test to the penalty phase in this case, the Court finds that Mrs. Durham would have her impartiality compromised against the defendant by knowing that another jury of 12 has concluded that he is a person worthy of the death sentence and that would affect her decision.

The prosecution's burden of proof in this case in the penalty phase -- it's not the prosecution's burden. It's the prosecution does maintain a burden, and that burden has been lightened by the fact that Mrs. Durham knew that Mr. Carpenter had been sentenced to the death penalty.

There is simply no way that she could have given the -- no matter what she felt about Mr. Carpenter, there's no way that she could have given that the same kind of

consideration knowing on one hand that the defendant already had been sentenced to death by another jury. So I think the prosecution's burden to that extent was lightened.

And it also certainly affected her ability to judge the defense that Mr. Carpenter was presenting with respect to an offer of life imprisonment. Basically, I think she would have to say, "What difference does that make because he's going to die anyhow, no matter what they tell us about it?" So she couldn't have treated it in the same light. So I really don't think there's any question, whatsoever.

And whether the standard that requires the prosecution to rebut the presumption of prejudice is either by a preponderance of the evidence or beyond a reasonable doubt, they failed on either score to rebut the presumption of prejudice with respect to the penalty phase.

Now, in the guilt phase of this case the Court finds that the evidence of guilt is overwhelming. And I've stated and would repeat again that I believe that without a shadow of a doubt that Mr. Carpenter was guilty of the charges that were presented against him without any question.

Now, the cases have never articulated the standard to be applied by an appellate court in determining whether the presumption of prejudice has been rebutted, but I find from the briefs filed by the parties that it's clear that the usual harmless error tests for determining the

prejudicial effect of an error is inapplicable, and that's PEOPLE vs. WATSON and CHAPMAN vs. CALIFORNIA.

Convincing evidence of guilt does not debrief the defendant of a right to a fair trial since a fair trial includes, among other things, the right to an unbiased jury, the presumption of innocence and the right to assert a defense after the prosecution has presented its case-in-chief.

So I couldn't -- I think the cases compel me to find, Mr. Posey, that the harmless error test cannot be applied in the context of jury misconduct, but I will, pursuant to your request, make a finding at the end as to how I would so find if it were to apply to this situation.

Now, with respect to the guilt phase, to rebut the presumption of prejudice the People must show that Mrs. Durham remained impartial despite her knowledge of appellant's other convictions for similar crimes and death sentence, and also, as the MARTINEZ test states, the prosecution's burden of proof was not lightened, and that no assertive defenses had been contradicted. That is a factual situation, and the likelihood of the same verdict despite the misconduct is of no consequence.

There are cases where a presumption of prejudice has been rebutted. Mr. Posey cited a number of those. There has been a number cited in the petitioner's brief, also.

Factors which have been considered are whether

the extrajudicial information was inherently nonprejudicial, whether the information pertained to matters unrelated to the pending case, whether the Court had an opportunity to alleviate the potential prejudice with a curative admonition to the jurors.

In this case the Court cannot find that the misconduct committed by Ms. Durham and the information she received was innocuous or of a trivial nature. I would find that the extrajudicial information that caused her misconduct was inherently prejudicial. It related directly to the pending action. And the Court was unable to give a curative admonition to the jury -- to the juror in this case.

Analyzing the criteria set forth in MARTINEZ, the respondent has not made a factual showing sufficient to rebut the presumption of prejudice in this case as to the guilt phase. In this case, the nature of the information was such that the juror's impartiality could not be anything but adversely affected.

The fact that the juror, first of all, knew that Mr. Carpenter was the kind of person that 12 other people had sentenced -- chose to sentence to death, in my judgment, could not but affect her determination of whether or not she could remain a fair and impartial juror as to this case and in evaluating the evidence and also his own testimony. So I definitely believe it affects her impartiality.

As to whether or not the prosecution's burden was

lightened in this case, this unique aspect of this case makes the information Mrs. Durham knew highly prejudicial, and that's the fact that it was conceded by the defense and argued by the prosecution that one person committed both the Santa Cruz and the Marin murders.

And the evidence really supported that theory. Both the defense assumed it and the prosecution argued it. And if the juror in this case, Ms. Durham, believed or understood that 12 other persons had found the petitioner, Mr. Carpenter, guilty of the Santa Cruz murders beyond a reasonable doubt, the prosecutor's job of proving the petitioner guilty beyond a reasonable doubt in the Marin cases would be much easier.

And I've talked about this during the course of the arguments, and I don't see any sense to re-elaborate on that question, the uniqueness of this case. I think the record is clear.

Of the time involved in the guilt phase of the trial, I would estimate that two-thirds of that time was directed at the evidence of the Santa Cruz Hansen/Haertle incident and remaining one-third was directed at proving the Marin crimes. That's how important they were. And that's what makes --

Everything was done in this case by the Court, as I've stated this morning before, to keep from the jury the evidence that Mr. Carpenter had been convicted of the Santa Cruz crimes, particularly the Hansen/Haertle crimes, in the guilt phase. And everything was done by this Court in its

rulings to keep from the jury in the penalty phase that Mr. Carpenter had been sentenced to death as a result of the Santa Cruz crimes. And despite everything that was done by way of evidentiary rulings and the like, this is exactly the information that Mrs. Durham had.

And there's no question in my mind, in talking about similar crimes, the one thing that I think is clear that Mr. Posey and Mr. Berlin have argued about through the use of the transcripts, the one thing that she would have definitely ascertained is the convictions related to the Santa Cruz crimes because that's where the transcripts were all directed in most of the impeachment of the Santa Cruz witnesses.

So if there was anything that could be derived from the use of the transcripts, if she didn't know specifically that the crimes were from Santa Cruz county, this then she would certainly have derived that information from the trial, given the use of the transcripts.

As to the third prong of the MARTINEZ test, that the petitioner asserts a defense, in this case, that he was not the trailside killer, that was certainly undermined by the knowledge that another jury had found that he was in fact the trailside killer.

So I can't find that that prong has been rebutted, either. And any one of the three prongs that has not been rebutted would be sufficient enough to give Mr. Carpenter a new trial.

And for these reasons, the Court reluctantly has

connected with this case. This is an absolute travesty that such a result could happen to such a case.

And I find the fault with the foreperson in this case, Barbara Durham. And as I've indicated before -- I have not done this yet because I wanted to wait until the ruling this afternoon -- a letter is going to be delivered to the Attorney General's office in San Diego as well as to the District Attorney's office for the County of San Diego that will state that on today's date this Court granted a new trial and set aside the conviction and death penalty sentence in the above-captioned case.

That the action by the Court was mandated by serious juror misconduct of the foreperson, Barbara Durham. And I am certain that your office is aware of the enormous effort and expense which has been wasted by the misconduct of Mrs. Durham. That I believe the matter should be reviewed for possible criminal prosecution under Penal Code Section 96.

And I'm enclosing with the letter the entire transcript of the jury misconduct and habeas corpus proceedings, and that I'm advising each party that I've made a similar referral to the other party and asking that I be advised of their decision in connection with the referral.

Mr. Posey, I take it from your remarks today the People certainly propose to take an appellate route with respect to the Court's ruling this morning. How would you suggest we proceed by way of further proceedings?

No. 95-5996

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DAVID J. CARPENTER, *Petitioner*,

v.

JAMES H. GOMEZ, Director, California Department of Corrections, and ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Respondents*.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

RESPONDENT OFFERS NO SOUND REASONING FOR THIS COURT TO DENY THE PETITION FOR WRIT OF CERTIORARI

A

Although respondents' opposition is lengthy, it conspicuously lacks extended analysis of the two questions presented by Mr. Carpenter in the petition for certiorari. The question the respondents present -- "Depending on the circumstances, may juror misconduct be subject to a harmless error analysis?" (Opp. i; see id. at 7) -- is not one of the questions presented by the petition,

by the facts of this case, or by the decision of the state court below. The answer to the respondents' question is undoubtedly yes, under some circumstances other than those presented here, jury misconduct can be harmless error.[1] Moreover, that unremarkable question would not be worthy of review by this Court. But respondents' analysis is irrelevant to the point made in the petition: that the two very different questions Mr. Carpenter actually presents are deserving of review by this Court.

As explained on pages 12-15 of the petition, trial before a biased factfinder can never be harmless error. Quoting Smith v. Phillips, 455 U.S. 209, 215 (1982), respondents argue that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Opp. 14. Here there was such a hearing, and Mr. Carpenter proved actual bias or, more exactly, the prosecution failed to overcome the presumption of prejudice by proving its absence. The judge who heard Juror Durham and the other witnesses testify about her misconduct found that she was not an impartial juror. RT 1693, 1696. At that point, without more, the remedy is reversal of the judgment. Tumey v. Ohio, 273 U.S. 510, 535 (1927). Certiorari should be granted because the state supreme court held otherwise.

Respondents put the present case on the other side of the line between "actual" and "implied" bias than did the state trial judge who heard the witnesses and made the findings of fact,

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1. Approaching the case as respondents do, as merely an instance of "jury misconduct" rather than as a case tried by a biased juror, would seem to lead to a perverse and counter-intuitive rule which would require automatic reversal when the factfinder is biased for systemic or institutional reasons not indicative of personal turpitude on his or her own part, e.g., Tumey v. Ohio, 273 U.S. 510 (1927), but would allow for a finding of harmless error when, as here, the factfinder is biased because of his or her own misconduct. Not surprisingly, none of the cases respondents cite support such an unacceptable rule. The rule that a biased factfinder requires automatic reversal has no exception for cases in which the factfinder is biased as a result of misconduct on his or her part.

by inappropriately drawing different inferences from the testimony than he did. Opp. 18-19.[2] In this passage of the opposition, respondents confuse the line between "actual" and "implied" bias with the very different line between bias proved by direct evidence and bias proved by circumstantial evidence. Juror Durham's actual bias was proved only by circumstantial evidence because her misconduct extended to lying under oath at the post-trial evidentiary hearing and denying that she had committed misconduct at all. Equating actual bias with direct evidence, as respondents do, would inappropriately make it more difficult to obtain relief in those cases where the juror's misconduct is more serious and extends to testifying falsely under oath. Three members of this Court analyzed the issue very differently than do respondents: "in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial." McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984) (Blackmun, J., concurring, joined by Stevens & O'Connor, JJ.). In the same vein, Justice O'Connor wrote separately in Smith v. Phillips, supra, "to express my view that the opinion does not foreclose the use of 'implied bias' in appropriate circumstances." 455 U.S. at 221 (O'Connor, J, concurring). Addressing the issues which respondents fail to confront, she said:

> Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it. The problem may be compounded when a charge of bias arises from juror misconduct, and not simply from attempts of third parties to influence a juror.

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2. Although the state supreme court erred in its legal analysis, it properly set forth the facts as found by the superior court judge at the evidentiary hearing. 9 Cal.4th at 642-43, quoted on pages 4-5 of the petition. Respondents inappropriately provide, in the "Argument" portion of their opposition, a statement of facts that, without differentiation, mixes testimony which the hearing judge did and did not find persuasive and credible. Opp. 8-11. The Court should not rely on respondents' version of the evidence taken at the hearing.

Id. at 222. See also Federal Rule of Evidence 606(b) and California Evidence Code § 1150, both precluding evidence of the effect of particular events on a juror's mental processes and thereby reducing the likelihood that juror bias can be proved by direct evidence.

Respondents' arguments do not withstand analysis because the state court judgment they are defending cannot withstand analysis. In Tumey v. Ohio, supra, the state argued that since "the evidence shows clearly that the defendant was guilty ... he can not complain of a lack of due process" by being tried by a judge with an interest in deciding the case against him. The Court responded, "No matter what the evidence was against him, he had the right to have an impartial judge." 273 U.S. at 535. In California, after the decision in the present case, the strength of the evidence is relevant in determining whether or not the factfinder was biased in the first place. 9 Cal.4th at 655. That holding cannot be reconciled with Tumey.

Certiorari should be granted because the court below has strayed far from well-established federal constitutional principles. Its position as the highest court in the most populous state magnifies the need for a grant of certiorari. All the many state courts of California will be required to follow the erroneous decision in this case unless certiorari is granted. Moreover, the California Supreme Court reviews a large number of capital cases, and the petition demonstrates that in these cases it frequently misapplies harmless error rules in much the same way as it did here.

B

Respondents' position is that the error which occurred in this case is subject to harmless error analysis. Conspicuously absent from the opposition is any discussion of the standard which would be applied if the error were subject to harmless error analysis: the "beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18, 24 (1967). Respondents have no answer for Mr. Carpenter's argument in section 2.B of his petition (pp. 15-21) that certiorari should be granted

because in this and other capital cases the California Supreme Court has erred by applying a standard of prejudice more tolerant of federal constitutional error than the Chapman standard. Indeed, respondents quote approvingly the California Supreme Court's standard under which relief is to be denied unless "it is substantially likely the juror was actually biased." Opp. 17, quoting 9 Cal.4th at 653. That is not the Chapman standard which requires the prosecution to prove the error harmless beyond a reasonable doubt. Section 2.B of the petition demonstrates that this is just one of many capital cases in which the California Supreme Court has eased the prosecution's burden of proving constitutional error harmless, or shifted the burden in whole or part to the defendant.

C

Respondent depends entirely on Romano v. Oklahoma, 512 U.S. __, 129 L.Ed.2d 1 (1994) to contend that petitioner's case is so clearly outside Caldwell v. Mississippi, 472 U.S. 320 (1985) as to be unworthy of this Court's consideration. As set forth in the petition at pages 7 through 11, the death verdict in Romano was distinctly more reliable than the verdict in the present case partly because the information affecting the jury's sense of responsibility was admitted into evidence, whereas the information obtained by Juror Durham in the present case was obtained outside court without the knowledge of the parties.

Respondents appear also to argue that petitioner's Caldwell claim is meritless because petitioner has not demonstrated Durham was prejudiced by learning about the prior death sentences. Opp. 18. They attempt to graft the two-prong state-law test, created by the California Supreme Court in addressing the jury misconduct claim, onto Caldwell error, and conclude that the effect of the information on Durham was "speculative at best." Ibid. This confusing analysis comports with neither Caldwell nor Romano. Under Caldwell, the diminished sense of a juror's responsibility undermines the Eighth Amendment's reliability requirement regardless of whether petitioner can

demonstrate empirically that the effect was to bias the judgment toward death. Caldwell, 472 U.S. at 341. Nothing in Romano holds otherwise. There is language in Romano noting the impossibility of knowing how the evidence of a prior death sentence might have affected the jury, but this is in the prejudice analysis of Romano's due process claim, not his Caldwell claim. See Romano, __ U.S. at __, 129 L.Ed.2d at 14.

In the present case there is an uncontested factual determination that the information obtained by juror Durham through misconduct diminished her sense of responsibility for the penalty decision at petitioner's trial. The California Supreme Court's analysis of the Caldwell issue was both perfunctory and incorrect. Certiorari should be granted to clarify the confusion created by the state court's decision and to establish how extraneous information obtained by juror misconduct that diminishes a juror's sense of responsibility may violate the Eighth Amendment as interpreted by Caldwell and Romano.

D

Respondents make a halfhearted suggestion, without citation of authority, that the judgment of the state court lacks finality. Opp. 19-20. They are mistaken, on both doctrinal and pragmatic levels. Initially, it is well established that a judgment finally resolving a collateral writ proceeding such as this one is a final judgment for purposes of review by this court, even though the underlying case remains pending in state court and further proceedings are contemplated. See, e.g., Fisher v. District Court, 424 U.S. 382, 385 n.7 (1976); Rescue Army v. Municipal Court, 331 U.S. 549, 565 (1947); Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 14 (1931). Insofar as the present case differs from those, the present case is even more appropriate for review. In the typical case involving, for instance, a pretrial writ of prohibition, the underlying lawsuit is already on file and must be disposed of by the state court. Here, on the other hand, the California Supreme Court merely

left open the possibility of Mr. Carpenter filing a new state habeas corpus petition. There is no such petition currently on file and no assurance that one will be filed.

More fundamentally, the state court's invitation to relitigate the issue is bound up with the federal constitutional error it committed. The state court invited Mr. Carpenter to file a new petition "based upon the combined records of the habeas corpus proceedings and the underlying trial." 9 Cal.4th at 659. As demonstrated at length in the petition for certiorari, pp. 12-15, as a matter of federal constitutional law, the record of the underlying trial is irrelevant to Mr. Carpenter's entitlement to relief. He is entitled to relief now, on the present record. The state court's invitation to file a new petition is merely an artifact of its erroneous belief that it could look to the record of the underlying trial in deciding whether Mr. Carpenter was tried by a biased factfinder, and whether he was prejudiced.

The judgment below is final; the issues presented in the petition are ripe for review now, on the present record.

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CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Supreme Court of California should be reversed.

Dated: October 19, 1995

Respectfully submitted,

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California State Public Defender

KENT BARKHURST
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ORIGINAL

No. 95-5996

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

DAVID J. CARPENTER, Petitioner,

v.

JAMES H. GOMEZ, Director, California Department of Corrections, and ARTHUR CALDERON, Warden of the California State Prison at San Quentin, Respondents.

CERTIFICATE OF FILING AND SERVICE

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

I, KENT BARKHURST, Attorney at Law, certify that pursuant to Rule 29 of this Court, the Reply To Brief In Opposition to Petition For Writ Of Certiorari, was filed and served with the Clerk of this Court and on counsel for respondents by depositing said Reply and copies thereof, in the United States Mail at San Francisco, California, on October 19, 1995, by First Class Mail, postage prepaid.

Service was made upon counsel for all respondents at the following address:

CARL HORST, Deputy Attorney General
110 West A Street, Suite 1100
San Diego, California 92101
(619) 645-2001

All parties required to be served have been served. I am a member of the Bar of this Court and am counsel for petitioner. I certify under penalty of perjury that the foregoing is true and correct.

Signed on 10/19/95

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SUPREME COURT OF THE UNITED STATES

DAVID JOSEPH CARPENTER *v.* JAMES H. GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 95–5996. Decided November 13, 1995

The petition for a writ of certiorari is denied.

MEMORANDUM OF JUSTICE STEVENS RESPECTING THE DENIAL OF CERTIORARI.

As I have pointed out on more than one occasion, an order denying a petition for certiorari expresses no opinion on the merits of the case. See, e.g., *Barber* v. *Tennessee*, 115 S.Ct. 1177 (1995) (opinion of STEVENS, J., respecting the denial of certiorari). That is so, in part, because the Court properly exercises broad discretion in the administration of its docket, and in part because there are often jurisdictional or prudential reasons for refusing to grant review of the questions presented in a petition. See *Singleton* v. *Commissioner*, 439 U. S. 940, 942–946 (1978) (memorandum of STEVENS, J., respecting the denial of certiorari). Nonetheless, when the Court denies a petition that raises a substantial question, it is sometimes useful to point out those concerns which, although unrelated to the merits, justify the decision not to grant review. See, e.g., *Lackey* v. *Texas*, 115 S.Ct. 1421 (1995) (memorandum of STEVENS, J., respecting the denial of certiorari); *McCray* v. *New York*, 461 U. S. 961, 962–63 (1983) (opinion of STEVENS, J., respecting the denial of certiorari).

As the dissent by three members of the California Supreme Court demonstrated, this case clearly raises a novel and important constitutional question: what

standard should be applied in determining whether juror misconduct involving highly prejudicial information requires reversal of a capital conviction and sentence? Here, a juror falsely denied receiving information that petitioner was already under a sentence of death for other crimes. In sustaining petitioner's collateral attack on his conviction, the state trial judge frankly acknowledged the absence of a clear standard for determining prejudice in such a case. See *In re Carpenter*, 889 P.2d 985, 1008 (Cal. 1995) (Mosk, J. diss.). In reversing the state trial judge's decision, the State Supreme Court impliedly acknowledged that no such standard exists by relying on cases of this Court that bear only a tangential relation to the issue involved. *Id.* at 993–995.

Despite the importance of the constitutional question presented, I concur in the order denying the petition for writ of certiorari. Because the State Supreme Court stated that the issue would remain open for further review when it acts on the direct appeal from petitioner's conviction, it is likely that the absence of a "final judgment" within the meaning of 28 U. S. C. § 1257 deprives this Court of jurisdiction to hear the case. At the very least, the expressed intention of the California Supreme Court to review the question further provides a prudential ground for declining to review at this time the juror misconduct issue presented in this petition.